TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 259.

THE UNITED STATES, PETITIONER,

vs.

G. FALK & BROTHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 19, 1906. CERTIORARI AND RETURN FILED MAY 14, 1906.

(20204.)

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a United States Circuit Court of Appeals for the Second Circuit.

G. FALK & BROTHER, APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } 3577.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States for the Southern District of New York.

1 At a stated term of the United States Circuit Court for the Southern District of New York, held in the United States post-office building in the city of New York, borough of Manhattan, on the 24th day of June, 1904.

Present: Hon. E. Henry Lacombe, circuit judge.

In the matter of the application of G. Falk & Bro. for a review of the decision of the Board of United States General Appraisers upon certain merchandise imported by them on the vessel and entered on the dates named in the accompanying schedule. } Order.

On reading and filing the petition of Gustav Falk, dated the 24th day of June, 1904, doing business under the name and style of G. Falk & Bro., and on motion of Hatch, Keener & Clute, attorneys for the petitioner, it is

Ordered that the Board of United States General Appraisers return to this court the record and evidence taken by them in the above matter, together with a certified statement of the facts involved and their decision thereon.

E. HENRY LACOMBE,
United States Circuit Judge.

2 United States Circuit Court for the Southern District of New York.

In the matter of the application of G. Falk & Bro. for a review of the decision of the Board of United States General Appraisers upon certain merchandise imported by them on the vessel and entered on the dates named in the accompanying schedule. } Petition.

To the Circuit Court of the United States for the Southern District of New York:

The petition of Gustav Falk respectfully shows and said petitioner alleges—

That he is now and at the times herein mentioned was doing business at number 171 Water street, in the city of New York, under the firm name of G. Falk & Bro.

That under such firm name your petitioner imported and entered at the port of New York certain merchandise on the dates mentioned in the accompanying schedule. That thereafter the collector at that port proceeded to ascertain, fix, and liquidate the rate and amount of duty to be paid on such merchandise under the provisions of an act of Congress entitled "An act to provide revenue for the Government, and to
3 encourage the industries of the United States," approved, and which took effect on the 24th day of July, 1897, and which rate and amount was in excess of the rate and amount required by law to be paid thereon under the said act.

That your petitioner being dissatisfied with the decision of the said collector as to the rate and amount so fixed, within ten days after, but not before said ascertainment and liquidation of duties, gave notice in writing to the collector, setting forth therein distinctly and specifically, in respect to each entry and payment, the reasons for their objections thereto, and paid the full amount of the duties and charges ascertained to be due thereon.

That thereafter the said collector transmitted the invoice and all the papers and exhibits connected therewith to the Board of United States General Appraisers, who, within the past thirty days, and on or about the 25th day of May, 1904, as set forth in the following schedule, reported that they had examined and decided as to the said entries and affirmed the decision of the said collector.

That your petitioner is dissatisfied with said decision of said Board of General Appraisers as to the construction of the law as to the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and that the following is a concise statement of the errors of fact and law complained of:

ERRORS OF FACT AND LAW.

First. The Board of United States General Appraisers erred in following in re Schmid, G. A. 4214 (T. D. 19715).

Second. The Board erred in holding that the duties on the tobacco in question were properly collected and based upon the weight of said tobacco at the time of entry.

4 Third. The Board erred in not holding that under the law, and particularly under section 20 of the Customs Administrative Act of June 10, 1890, as amended by the Act of Congress, approved December 15, 1902, the protestants should be required to pay only the duties and charges to which the merchandise was subject by law at the time of its withdrawal from bonded warehouse for consumption.

Fourth. The Board erred in not holding that the customs officials erred in levying and collecting duties upon the weight of the merchandise at the time of its entry or importation, and in not holding that under the law the customs officials should reweigh the goods at the time of their withdrawal from bonded warehouse, and that the duties should be levied and based upon the weight at the time of such withdrawal, and also in not directing the refunding to the G. Falk & Bro. of the difference between the duties based upon the weight at the time of withdrawal from warehouse.

Fifth. The Board erred in overruling the protests and affirming the decision of the collector, and in not sustaining the protests and reversing the decision of the collector.

The following is a description of the importations embraced in this petition, namely:

SCHEDULE.

Description of merchandise.	Name of vessel.	Date of entry.	Number of protest.	Date of decision.
Tobacco	Ryndam ..	June 2-02	106, 197-17, 868	May 25, 1904
	Ryndam ..	June 2-02	106, 199-21, 870	May 25, 1904
	"	"	106, 198-18, 401	

5 Wherefore your petitioner prays that the said Circuit Court review the questions of law and fact involved in the decision of the Board of United States General Appraisers heretofore made in the above matter as to the classification and rate of duty assessed upon the merchandise, and for that purpose that an order may be entered requiring said Board of United States General Appraisers to return to the said Circuit Court the record and evidence taken by them, together with a certified statement of facts involved in the case, and their decision thereon, and your petitioner prays for such additional orders and relief as it may be entitled to in the judgment of this court, and pursuant to the statutes of the United States in such case made and provided.

Dated New York, June 24, 1904.

G. FALK & BRO.,
By HATCH, KEENER & CLUTE,
Attorneys.

HATCH, KEENER & CLUTE,
Attorneys for Petitioner,
100 Broadway, New York City.

Know all men by these presents: That I, Walter F. Welch, residing at No. 52 Morningside avenue, in the city of New York, am held and firmly bound unto the United States of America in the sum of fifty ($50) dollars, to be paid to the United States of America, for the payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with my seal and dated the 24th day of June, in the year nineteen hundred and four.

WALTER F. WELCH. [L. S.]

6 Whereas G. Falk & Bro. has applied to the Circuit Court of the United States for the Southern District of New York for a review of the questions of law and fact involved in a certain decision of the Board of United States General Appraisers, made on certain mer-

chandise imported by said G. Falk & Bro. and entered on the vessels and dates named in the foregoing schedule;

Now, therefore, the condition of this obligation is such that if the said G. Falk & Bro. shall prosecute said proceeding with effect, and pay all damages and costs which shall be awarded against them therein if they fail to make said proceeding good, then this obligation to be void otherwise the same shall be and remain in full force and effect.

WALTER F. WELCH. [L. S.]

Sealed and delivered and taken and acknowledged this 24th day of June, 1904.

[SEAL.] A. DELOS KNEELAND,
Notary Public No. 78, New York County.

UNITED STATES OF AMERICA,
Southern District of New York, county of New York, ss:

Walter F. Welch, being duly sworn, says: That he resides in the Southern District of New York, in the city of New York, and that he is worth the sum of one hundred ($100) dollars over and above all his just debts and liabilities.

WALTER F. WELCH.

Sworn to before me this 24th day of June, 1904.

[SEAL.] A. DELOS KNEELAND,
Notary Public No. 78, New York County.

7 The above bond is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court for the Southern District of N. Y. In the matter of the application of G. Falk & Bro. for a review of the decision of the Board of United States General Appraisers relative to tobacco. Petition, order, and bond. Hatch, Keener & Clute, attorneys for petitioner, 100 Broadway, N. Y. City. U. S. Circuit Court, Southern District of New York. Filed June 24, 1904. John A. Shields, clerk.

In the Circuit Court of the United States for the Southern District of New York.

In the matter of The application of G. Falk & Bro. for the review of a decision of the Board of U. S. General Appraisers as to the amount of duty on certain tobacco imported in the S/S "Ryndam," June 2, 1902.	Suit No. 3577. Return of the Board of United States General Appraisers to the order of Hon. E. Henry Lacombe, circuit judge. Dated New York, Jul. 21, 1904.

The Board of United States General Appraisers, sitting at New York, in response to the order of the court in the above mat'er, make the fol-

lowing return of the record and evidence taken by them in the
8 above matter, and of the facts involved therein, as ascertained by them.

They state that a letter, hereto annexed as Exhibit A, was received from the collector of customs at New York, submitting, under the provisions of section 14 of the act of June 10, 1890, the protests marked Exhibits B, C, and D and described as follows:

Coll's. No.	Board No.	Protestants.	Vessel.	Date of entry.
17868	106197	G. Falk & Bro.....	Ryndam	June 2, 02
18401	106198	"	"	"
21870	106199	"	"	"

On May 25th, 1904, the Board rendered a decision upon said protests. A copy of the opinion is annexed as Exhibit E and a copy of G. A. 4214 is annexed as Exhibit F.

Exhibit A.

United States Customs Service,
Port of New York, February 4, 1904.

Board of U. S. General Appraisers,
Port of New York.

Gentlemen: I submit the protests of G. Falk & Bro., Nos. 17868, 18401 and 21870, against the assessment of duty as made by this office on certain "tobacco" imported by them in the "Ryndam," June 2, 1902.

I have to state that the original warehouse entry was liquidated July 3, 1903. As none of these protests was lodged within ten days after that date, they are rejected by this office as not being lodged within the statutory time. Note G. A. 91, 127, 3311, 5478, and 5512.

9 Moreover, an inspection of the invoice and entry shows that the tobacco in question was assessed with duty upon the weight as found and returned by the U. S. weigher at time of importation. Note proviso to section 33, act of July 24, 1897, and G. A. 4214.

Respectfully, yours,

J. J. Couch,
Special Deputy Collector.

5 inclosures.

(Endorsed:) 106, 197, 106, 199. United States customs service, port of New York, N. Y., office of the collector. February 5, 1904. N. N. Stranahan, collector. Subject: Protests Nos. 17866, &c., of G. Falk & Bro. Received by board of U. S. general appraisers, Feb. 5, 1904.

Exhibit B.

August 24th, 1903.

To the honorable collector of customs, port of New York:

Please take notice that we protest against your decision as to the rate and amount of duties to be paid on one bale leaf tobacco, marked and

numbered 2263, one bale imported per S. S. "Ryndam" from Rotterdam, entered by us June 2nd, 1902, for warehouse bond No. 62001, entry No. 101451, reliquidated and withdrawn from warehouse August 21st, 1903, and claim, as reasons for our objections thereto:

That under the law, and particularly under section 20 of the customs administrative act of June 10, 1890, as amended by the act of
10 Congress approved December 15th, 1902, we should be required to pay only the duties and charges to which the merchandise is subject by law at the time of its withdrawal from bonded warehouse for consumption.

We contend that the customs officials erred in levying and collecting duties upon the weight of the merchandise at the time of its entry or importation, and that under the law they should reweigh the goods at the time of their withdrawal from bonded warehouse, and that the duties should be levied and based upon the weight at the time of such withdrawal (see weigher's return annexed); and we ask to have refunded to us the difference between the duties based upon the weight at the time of entry, and the duties based upon the weight at the time of withdrawal from warehouse.

We further claim that our demand that the merchandise be reweighed by the Government at time of its withdrawal from warehouse having been refused, a new ascertainment or reliquidation of the duties has occurred, and we are entitled to protest within ten days after such ascertainment or reliquidation.

We pay the amount exacted under compulsion, solely to get the goods, reserving all rights.

G. FALK & BRO.,
By HATCH, KEENER & CLUTE,
Attorneys for Importers,
100 Broadway, New York City.

(Endorsed:) 106, 197, 17868. G. Falk & Bro. "Ryndam." Admin. (Leaf tobacco. Too late.) Vessel, "Ryndam," entry, 1902, June 2, Liq. 1902, Jul. 3, Pro. 1903, Aug. 25, custom-house, New York, Aug. 25, 1903, received. Entry No. 101451 was liquidated July 3, 1902. The protest was lodged August 25, 1903; not entertained; not in time.

11 United States Circuit Court, Southern District of New York.

G. FALK & BRO. *against* THE UNITED STATES. } Suit No. 3577. Stipulation.

It is hereby stipulated by and between the attorneys for the respective parties in the above-entitled action that Exhibits C and D, contained in the return of the Board of United States General Appraisers, and the weighers' returns attached thereto, need not be printed in the record on appeal herein to the United States Circuit Court of Appeals for the Second Circuit, but the said exhibits and weighers' returns may be offered

by either party on the argument of this cas in the said Circuit Court of Appeals for the inspection of the court.

Dated New York, February 14, 1905.

HATCH, KEENER & CLUTE,
Attorneys for Appellee.
HENRY L. BURNETT,
Attorney for Appellant.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Filed Feb. 15, 1905. John A. Shields, clerk.

12 EXHIBIT E.

NEW YORK, *May 25, 1904.*

United States General Appraisers.
Leaf tobacco (weight of)

17668
In the matter of protest 106,197 9 18401 of G. Falk & Co. against the
21870
assessment of duty by the collector of customs at the port of New York.

Before Board No. 3. Somerville, general appraiser.

The merchandise in question consists of tobacco, entered for warehouse, the original warehouse entry being liquidated June 3, 1903. Duty was assessed on the weight of the tobacco as found and returned by the U. S. weigher at the time of importation. The importer demanded that the merchandise be reweighed at the time of withdrawal from warehouse, which request was refused by the collector. The importer claimed that the tobacco was dutiable upon the basis of the weight on withdrawal, and not upon entry. This precise question was passed on by the Board In re Schmidt, G. A. 4214 (T. D. 19715), where it was held, as we think correctly, that the dutiable weight of the tobacco was to be estimated at the time of importation, and not at the time of withdrawal.

The protest is overruled and the collector's decision affirmed.

(Sd.) BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

2 enclosures.
Entry and invoice returned herewith.
Entry 101451 02.
Col. L. Feb. 4, 1904.
J. L. K.

13 EXHIBIT F.

For publication. Copy of G. A. 4214.

JULY 14, 1898.

Before the U. S. General Appraisers at New York.

In the matter of the protest 29,636-F, &c., of L. Schmid & Co. et al. against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain merchandise imported per the vessels and entered on the dates named in the schedule.

Opinion by SOMERVILLE, G. A.

The goods in question consist of tobacco, some of which was imported prior to July 24, 1897, and some after said date. All of the merchandise was entered under bond for warehousing without the payment of duty, at the respective dates shown by the record, and was withdrawn from warehouse after the present tariff act of 1897 went into legal effect, and was assessed for duty by the collector under appropriate paragraphs of said act, upon the bases of the weights of the goods as ascertained at the several dates of entry.

The contention in each of the protests is the same, being in the following language:

"We claim said merchandise to be subject to duty under the provisions of Schedule F of the act of July 24, 1897, based upon the weight at time of its withdrawal from bond for consumption under the provisions of sections 50 of the act of October 1, 1890.

We claim that the proviso to section 50 of the act of October 1,
14 1890, has not been repealed, but is in full force and effect and is applicable to merchandise entered in bond subsequent to the passage of the act of July 24, 1897.

Section 33 of the present tariff act (of 1897) was construed by the Board in re Haynes & Co. (G. A. 4033) where certain features of the section are discussed at some length. It is perfectly clear that an irreconcilable repugnancy exists between the provisions of section 50 of the tariff act of 1890, and those of section 33 of the act of 1897, and therefore the former section is necessarily repealed by the latter. Especially is this true as to the provisos attached to those sections relating to the weights of such merchandise. The last proviso of said section 50 reads as follows:

Provided further: That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

That of said section 33 is as follows:

Provided, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

It requires no argument to demonstrate that the latter proviso repeals the former, a conclusion which is rendered more emphatic by the provisions of section 34 of the tariff act of 1897. Nor are we able to perceive any sound reasons that could be urged to invalidate such a law because made applicable to prior importations not then completed by a delivery of the importations in question to the consignees or owners. Westfall v. Shook, 5 Blatch., 383; cited in re Wolff, G. A. 2775; and in re Louisville Pub. Warehouse Co., G. A. 2816.

15 Without considering the question as to whether the protests were filed in time, we base our decision on the proposition that section 50 of the tariff act of 1890, on which the protestants predicate their right of recovery, has been repealed by section 33 of the tariff act of 1897 now in force.

All the protests are overruled, and the collector's decision in each case is affirmed.

And for a certified statement of the facts involved in said matter, as ascertained by them, the said Board states that said facts are fully set fourth in the decision afore mentioned, and that no other facts were ascertained by said Board than such as are shown by said decision and other exhibits hereto attached.

B. S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

(Endorsed:) No. 3577. U. S. Circuit Court, Southern District of New York. In the matter of the application of G. Falk & Bro. for a review of the decision of the Board of U. S. General Appraisers as to the rate and amount of duty on certain imported merchandise. Return of the Board of U. S. General Appraisers. U. S. Circuit Court, Southern District of New York. Filed Jul. 22, 1904. John A. Shields, clerk.

16 At a stated term of the Circuit Court of the United States, for the Southern District of New York, in the Second Circuit, held at the United States court rooms, in the city of New York, on the 2d day of August, 1904.

Present: Hon. E. Henry Lacombe, circuit judge.

G. FALK & BRO.
against
THE UNITED STATES. } Suit No. 3577.

On the application of G. Falk & Bro., through their attorneys, Hatch, Keener & Clute, No. 100 Broadway, borough of Manhattan, city of New York, it is

Ordered that this cause be referred to Hon. Marion L. De Vries, one of the United States General Appraisers, as an officer of this court, to take and return to the court such further evidence herein as may be offered by the said G. Falk & Bro., or their attorneys, and that the United States attorney for the Southern District of New York have reasonable notice of the time and place of taking such further evidence.

E. HENRY LACOMBE,
United States Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro. v. The United States. Suit No. 3577.
17 Order of reference. Hatch, Keener & Clute, Attys. for importers, 100 Broadway, N. Y. City. U. S. Circuit Court, Southern District of New York. Filed Aug. 3, 1904. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

G. FALK & BRO. vs. THE UNITED STATES. } No. 3577.

AMERICAN CIGAR COMPANY vs. THE UNITED STATES. } No. 3606.

Appeals from decisions of the Board of United States General Appraisers.

PLATT, District Judge.

The merchandise in question consists of certain tobacco, entered in bonded warehouse and subsequently withdrawn. At the time of withdrawal the importer claimed that such tobacco had lost in weight and that duties should be assessed thereon according to the weight at the time of withdrawal, the collector having liquidated the duties upon the entered weight of such merchandise.

18 The position taken by the Board of General Appraisers, namely, that section 33 of the act of 1897 is repugnant to section 50 of the act of 1890, is untenable, because neither of said sections is general in its application, but is restricted to merchandise previously imported for which no entry has been made.

Upon another ground, however, it would seem that the general position taken by the Board ought to be sustained. The importers contend that section 20 of the act of June 10, 1890, as amended by the act of December 15, 1902, authorizes them to withdraw the merchandise from the warehouse upon payment of duties and charges based upon its weight at the time of withdrawal. To reach this conclusion they are obliged to contend that the section just quoted repeals section 2983 of the Revised Statutes, which reads:

"In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse."

That is, they are forced to make that contention if the plain reading of section 2983 covers such a loss of weight as occurred in the case of the merchandise in question. It seems too plain for discussion that the word "loss" coupled as it is in the disjunctive with "leakage" applies precisely to such a case as the one before us. I can not find any sound reason for believing that the Congress did not have section 2983 in mind when it enacted said section 20, as amended. It is obvious that section 20, especially as amended, refers exclusively to rate rather than

19 weight. For these reasons the decision of the Board of Appraisers ought to be sustained.

Decision affirmed.

J. Stuart Tompkins, Attorney for Importers.

Henry A. Wise, Asst. U. S. atty. for United States.

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro. vs. The United States (3577). American Cigar

Company vs. The United States (No. 3606). Opinion, Platt, J. U. S. Circuit Court, Southern District of New York. Filed Dec. 22, 1904. John A. Shields, clerk.

At a stated term of the Circuit Court of the United States, for the Southern District of New York, held at the United States Circuit Court rooms in the Post-Office building, in the city of New York, on the 23d day of December, in the year of our Lord one thousand nine hundred and four.

Present: The Hon. James P. Platt, judge.

G. FALK & BRO. *vs.* UNITED STATES. } "A" suit No. 3577. Cal. No. 168.

20a The above cause coming on for hearing and determination before this court on the application of G. Falk & Bro., importers, for a review of the questions of law and fact involved in the decisions of the Board of U. S. Appraisers herein, and on the return of the Board of General Appraisers of the record and evidence taken by them, with their statement of the facts involved therein, together with their decisions thereon.

Now, after hearing Henry A. Wise, asst. U. S. attorney, on behalf of the collector for affirmance, and Hatch, Keener & Clute, counsel for the said importers, for reversal, on motion of Henry L. Burnett, U. S. attorney,

It is ordered, adjudged, and decreed that there was no error in said proceedings before said Board of General Appraisers, and that their decisions herein be and the same are hereby in all things affirmed.

JAMES P. PLATT,
U. S. Judge.

(Endorsed:) "A" suit No. 3577. U. S. Circuit Court, Southern District of New York. G. Falk & Bro. vs. United States. Judgment of affirmance. Henry L. Burnett, U. S. attorney. U. S. Circuit Court, Southern District of New York. Filed Dec. 20, 1904. John A. Shields, clerk.

21 United States Circuit Court, Southern District of New York.

G. FALK & BRO., APPELLANT, *v.* THE UNITED STATES, APPELLEE. } Application for allowance of appeal.

To the honorable judges of said court:

The petition of Gustav Falk, doing business at No. 171 Water street, in the city of New York, under the name of G. Falk & Bro., prays that the petitioner may be allowed, by his attorneys, Hatch, Keener & Clute, an appeal to the United States Circuit Court of Appeals for the Second Circuit, from the decree passed and the judgment entered in pursuance thereof in this case, on the 23d day of December, 1904, affirming the decision of the Board of United States General Appraisers, which overruled the protest of the importer; and that a proper citation may be

issued and served upon Nevada N. Stranahan, collector of customs at the port of New York, or his attorney; and that the record of said decree and judgment, and all papers relating thereto, shall be transmitted to said United States Circuit Court of Appeals for the Second Circuit, in
22 order that the said decree may be reviewed and reversed by said United States Circuit Court of Appeals.

HATCH, KEENER & CLUTE,
Attorneys for Appellant,
100 Broadway, Borough of Manhattan, City of New York.

Allowed.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro., appellant, vs. The United States. Suit No. 3577. Application for allowance of appeal. Hatch, Keener & Clute, attys. for appellant, 100 Broadway, N. Y. City. A copy of the within paper has been this day received at this office. Jan. 21, 1905. Henry L. Burnett, U. S. atty. U. S. Circuit Court, Southern District of New York. Filed Jan. 21, 1905. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

G. FALK & BRO., APPELLANT, } Assignment of errors.
v.
THE UNITED STATES, APPELLEE, } Suit No. 3577.

Now comes the appellant, Gustav Falk, doing business at No.
23 171 Water street, in the city of New York, under the name of G. Falk & Bro., and files the following assignment of errors, upon which he will rely and which are intended to be urged upon his appeal herein.

I. The United States Circuit Court for the Southern District of New York, erred in affirming and in not reversing the decision of the Board of United States General Appraisers herein.

II. The said court erred in sustaining and in not reversing the decision of the collector.

III. The said court erred in holding that the duties in question were properly collected, and based upon the weight of the tobacco at the time of entry.

IV. The said court erred in holding that section 2983 of the United States Revised Statutes was applicable and in not holding that it was inapplicable to this case.

V. The court erred in holding, either directly or by implication, that any injury, damage, deterioration, loss or leakage was sustained by the merchandise in controversy while deposited in any public or private bonded warehouse, within the meaning of said section 2983.

VI. The court erred in holding, directly or by implication, that said section 2983 has not been repealed, and in not holding that it has been repealed or modified by section 20 of the customs administrative act of June 10, 1890, or by said section 20, as amended by the act of Congress, approved December 15, 1902.

VII. The court erred in holding either that section 20 of the act of June 10, 1809, or that said section 20, as amended by the said
24 act of December 15, 1902, refers exclusively to rate rather than weight, and in not holding that the said acts refer both to rate and weight or amount of duties.

VIII. The said court erred in not holding that under the law, and particularly under the said section 20, as amended, the importer herein should be required to pay only the duties and charges to which the merchandise was subject by law at the time of its withdrawal from bonded warehouse for consumption.

IX. The said court erred in not holding that the customs officials erred in levying and collecting duties upon the weight of the merchandise at the time of its entry or importation, and in not holding that under the law the customs officials should reweigh the goods at the time of their withdrawal from bonded warehouse, and that the duties should be levied and based upon the weight at the time of such withdrawal, and also in not directing judgment refunding to Gustav Falk, the difference between the duties based upon the weight at the time of entry, and the duties based upon the weight at the time of withdrawal from warehouse.

HATCH, KEENER & CLUTE,
Attorneys for Appellant, No. 100 Broadway,
Borough of Manhattan, City of New York.

Dated New York, January 19, 1905.

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro., appellant, against The United States. Suit No. 3577. Assignment of errors. Hatch, Keener & Clute, attys. for appellant, 100 Broadway, N. Y. City. U. S. Circuit Court, Southern District of New York. Filed Jan. 20, 1905. John A. Shields, clerk.

25 Know all men by these presents, that I, Vincent P. Donihee, residing at No. 147 West 61st street, in the city of New York, am held and firmly bound unto the United States of America in the sum of two hundred and fifty ($250) dollars, to be paid to the United States of America, for the payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents.

Sealed with my seal and dated the 19th day of January, in the year nineteen hundred and five.

Whereas Gustav Falk has applied to the United States Circuit Court of Appeals for the Second Circuit for the allowance of an appeal from the decision of the United States Circuit Court for the Southern District of New York, rendered on the day of , 1904, in an action of said G. Falk & Bro. against the United States.

Now, therefore, the condition of this obligation is such that if the said Gustav Falk shall prosecute said appeal with effect and shall answer all costs of the appeal which may be awarded against them if they fail to make good said appeal, then the obligation shall be void; otherwise to remain in full force and effect.

VINCENT P. DONIHEE.

Sealed and delivered and taken and acknowledged this 19th day of January, 1905.

[SEAL.] GEORGE S. LUDLOW,
Notary Public, N. Y. Co.

26 UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

Vincent P. Donihee, being duly sworn, says that he resides in the Southern District of New York, in the city of New York, and that he is worth the sum of two hundred and fifty ($250) dollars, over and above all his just debts and liabilities.

VINCENT P. DONIHEE.

Sworn to before me this 19th day January, 1905.

[SEAL.] GEORGE S. LUDLOW,
Notary Public, New York County.

Approved.

E. H. LACOMBE, *U. S. Circuit Judge.*

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro., appellant, against The United States, appellee. Suit No. 3577. Bond. Hatch, Keener & Clute, attys. for appellant, 100 Broadway, N. Y. City. U. S. Circuit Court, Southern District of New York. Filed Jan. 20, 1905. John A. Shields, clerk.

27 By the Honorable E. H. Lacombe, one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Nevada N. Stranahan, collector of customs of the port of New York, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden in the borough of Manhattan, in the city of New York, in the district and circuit above named, on the 17th day of February, 1905, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein G. Falk & Bro. is appellant and the United States appellee, and you are required to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named this 20th day of January, in the year of our Lord one thousand nine hundred and five, and of the Independence of these United States, the one hundred and twenty-ninth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. G. Falk & Bro., appellant, vs. The United States,
28 appellee. Suit No. 3577. Citation. Hatch, Keener & Clute, 100 Broadway, N. Y. City, attys. for appellant. A copy of the within paper has been this day received at this office. Jan. 21, 1905. Henry L. Burnett, U. S. attorney. U. S. Circuit Court, Southern District of New York. Filed Jan. 21, 1905. John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to thirty, inclusive, contain a true and complete transcript of the record and proceeding had in said court, in the cause entitled G. Falk & Bro., appellant, against The United States, appellee (suit No. 3577), as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the Southern District of New York, in the Second Circuit, this 28th day of February, in the year of our Lord one thousand nine hundred and five, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

29 United States Circuit Court of Appeals for the Second Circuit.

Nos. 69 and 70. October term, 1905.

Argued December 22, 1905. Decided January 17, 1906.

THE AMERICAN CIGAR COMPANY, APPELLANT,
vs.
THE UNITED STATES, APPELLEE.
[3606]

G. FALK & BROTHER, APPELLANTS,
vs.
THE UNITED STATES, APPELLEE.
[3577]

Appeals from the Circuit Court of the United States for the Southern District of New York.
Before Judges Lacombe, Townsend, and Coxe.

These causes come here upon appeals by the importers from a decision of the United States Circuit Court for the Southern District of New York, affirming a decision of the Board of General Appraisers, which sustained the action of the collector.

TOWNSEND, Circuit Judge.

In the case of The American Cigar Company v. The United States, the merchandise in question, leaf tobacco, imported under the provisions of the act of July 24, 1897, was duly placed in bonded warehouse, properly classified for duty under paragraph 213 of said act, and assessed
30 for duty on the basis of weight "at the time of its entry," under section 33 of said act. There is nothing in the record to show that this assessment was not based upon the actual weight of the tobacco upon its arrival at the port of New York. Some time afterwards, when the importer made a withdrawal of tobacco from the warehouse, it was ascertained that it weighed considerably less than at the date of entry.

The importer, however, within ten days after liquidation and before withdrawal of the tobacco from bond, had filed a protest, claiming that under the provisions of section 20 of the customs administrative act of June 10, 1890, it should be required to pay only the charges to which

such merchandise should be subject at the time of its withdrawal for consumption.

No other ground of protest was stated or is claimed herein.

The Board overruled the protest, on the ground that it was prematurely filed, because no cause of action could arise—

"until the withdrawal of the merchandise from bond, for until then it could not be assumed that the collector would refuse to reliquidate the entry upon the basis claimed by the importer, nor could it be known or ascertained that there was any change in the weight of the tobacco until withdrawn and actually weighed."

Furthermore, the original liquidation might be subject to revision by reason of alteration of the law, or of such changes in the character or condition of the merchandise as would make it the duty of the collector to revise his original classification.

Section 14 of the customs administrative act provides that all objections of this kind in the nature of protests must be filed within ten days after "but not before such ascertainment and liquidation of duties, as well in case of merchandise entered in bond as for consumption."

31 If upon such withdrawal it should appear that there was a change in the weight of the merchandise, and the collector should refuse to reconsider his previous action or to acquiesce in the claim of the importer, such refusal would constitute a definite and final ascertainment and liquidation of duties, against which a protest might be filed thereafter, but not before.

The decision of the court below in The American Cigar Company v. The United States is affirmed, on the ground that the protest was prematurely filed.

In Falk v. The United States the tobacco was duly entered under bond for warehousing without payment of duty. When it was subsequently withdrawn, the importer claimed that the tobacco had lost weight by reason of evaporation of moisture, and demanded that it be reweighed, claiming that it was dutiable upon the basis of the weight on withdrawal and not on entry. The collector refused the demand of the importer, and assessed duty on the weight of the tobacco as returned by the United States weigher at the time of importation. Within ten days after such refusal this protest was filed, and the question as to the propriety of the action of the collector of the Board in affirming his action and of the court below in sustaining the decision of the Board are properly before this court for review.

The court below reached its conclusion, on the ground that the case was governed by the provision of section 2983, of the Revised Statutes, that—

"In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise, while deposited in any public or private bonded warehouse."

We are unable to concur in this conclusion. There is no claim herein for any injury or loss sustained by the merchandise in question. None of the taxable subject-matter has been lost. All of the other terms, "injury, damage, deterioration, leakage," refer to actual reduction

32 in the value or quantity of the merchandise itself. That the loss provided for in this section relates solely to the loss of the mer-

chandise subject to duty is further indicated by the language of section 2964, which provides for an abatement or refund of duties in case of "actual injury or destruction, in whole or in part, of any merchandise by accidental fire or other casualty" when in a warehouse.

Thus, by these two sections, the importer is protected in case of loss of warehoused merchandise by casualty, the Government is protected in case of loss of merchandise from any other cause. It is clear that evaporation of moisture is not "loss * * * sustained by * * * merchandise."

This merchandise was dutiable under the provisions of paragraph 213 of the act of 1897, as wrapper tobacco unstemmed, at $1.85 cents per pound. The difference between its weight when entered in the warehouse and when withdrawn for consumption was due to evaporation of moisture while in the warehouse.

The general rule is that revenue can be collected only upon the quantity or weight of the taxable subject-matter which is actually imported and received by the importer so as to come into the consumption of the country. Marriott v. Brune (9 How., 619); Lawder v. Stone (187 U. S., 281.)

We have seen that the provision as to leakage and loss has no application to evaporation of moisture. This case is analogous to Seeberger v. Wright & Lawther Co. (157 U. S., 183), where the difference in weight and consequently in rate was due to the removal of nontaxable accidental impurities. There, the United States Supreme Court held that where the amount of such impurities could be fixed at a certain percentage it should be deducted from the taxable product and allowance made therefor.

33 Section 33 of the act of 1897 provided as follows:

"That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry."

Section 20 of the customs administrative act of June 10, 1890, as amended in section 54 of the tariff act of October 1, 1890, provided as follows:

"Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal."

This section was amended by the act of December 15, 1902, by the addition of the following:

"Provided, that the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal."

In Mosle v. Bidwell (130 Fed., 334), in discussing this act as amended, this court held that the amendment of 1902 was declaratory of the meaning of the statute prior to said amendment, and that its meaning as thus declared was that no greater or different duties could be imposed than those to which other like goods imported at the time of withdrawal would be subject.

We think this decision is conclusive upon the question herein. If other like goods had been imported at the time when these goods were with-

drawn, duty would have been assessed thereon according to their weight at such time.

That this language should not be construed to mean the duties
34 assessed on the original entry is shown by the language of section 2970 of the United States Revised Statutes, which is as follows: "Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of the original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after one year from the date of the original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

Section 20 of the customs administrative act, as shown above, reenacted the provision as to payment of duties on withdrawal. But in section 2970 the distinction is sharply drawn between "duties * * * to which it may be subject by law at the time of withdrawal" and "duties assessed on the original entry."

It is well settled that the importation is not complete while the goods remain in the custody of the officers of customs, Fabbri v. Murphy (95 U. S., 191), and that the liquidation by the collector is not necessarily final until after the goods have been delivered to the importer. Hartranft v. Oliver (125 U. S., 525, 528).

The decision of the court below in G. Falk & Brother v. the United States is reversed.

J. S. Tompkins, for the appellants.
H. A. Wise, for the appellee.

35 At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York, on the 29th day of January, one thousand nine hundred and six.

Present: Hon. E. Henry Lacombe, Hon. William K. Townsend, Hon. Alfred C. Coxe, circuit judges.

G. Falk & Brother, appellants,
vs.
United States, appellee. } 3577.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said Circuit Court be and it hereby is reversed.

It is further ordered that a mandate issue to the said Circuit Court in accordance with this decree.

E. H. L.
A. C. C.

36 Endorsed: United States Circuit Court of Appeals, Second Circuit. Falk vs. U. S. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 29, 1906. William Parkin, clerk.

37 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 34, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of G. Falk & Brother against United States, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 9th day of April, in the year of our Lord one thousand nine hundred and six and of the Independence of the said United States the one hundred and thirtieth.

[SEAL.] WM. PARKIN, *Clerk.*

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which G. Falk & Brother are appellants and the United States is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
39 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the first day of May, in the year of our Lord one thousand nine hundred and six.

[SEAL] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

40 (Indorsed:) File No. 20204. Supreme Court of the United States, No. 702, October term, 1905. The United States vs. G. Falk & Brother. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed May 10, 1906. William Parkin, clerk.

41 Supreme Court of the United States, October term, 1905.

THE UNITED STATES
vs.
G. FALK & BROTHER. } No. 702.

Stipulation as to return.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court shall be taken as the return of the clerk of the Circuit Court of Appeals for the Second Circuit to the writ of certiorari issued herein.

HENRY M. HOYT,
Solicitor-General.
HATCH, KEENER & CLUTE,
Counsel for Respondents.

MAY 2, 1906.

(Endorsed:) U. S. vs. Falk. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed May 10, 1906. William Parkin, clerk.

42 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made having been lately certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is herewith annexed, and certified as a return to the writ of certiorari issued herein.

Dated New York, May 10, 1906.

[SEAL] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

43 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. G. Falk & Bro. v. U. S. Return to writ of certiorair. Supreme Court U. S. Office of the clerk. Received May 14th, 1906.

44 (Indorsed:) File No. 20204. Supreme Court U. S., October term, 1905. Term No. 702. The United States, petitioner, vs. G. Falk & Brother. Writ of certiorari and return. Filed May 14, 1906.

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Office Supreme Court U. S.
FILED
APR 19 1906
JAMES H. McKENNEY,
Clerk.

No. 702. 259.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, PETITIONER,

v.

G. FALK & BROTHER.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, PETITIONER,
v.
G. FALK & BROTHER. } No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.

The Solicitor-General, on behalf of petitioner, respectfully prays for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Second Circuit adjudging that the weight of imported tobacco at the time of its withdrawal from the Government warehouse for consumption, and not its weight when entry is made with the collector, determines the amount of duties payable thereon.

BRIEF.

STATEMENT OF CASE.

G. Falk & Brother in 1902 imported, entered, and warehoused certain tobacco. When withdrawn in 1904, the collector assessed duty according to the weight returned at original entry against Falk's protest that the weight at withdrawal should govern. (R., 8, 9, 10.) The Board of General Appraisers sustained the collector under proviso to section 33, tariff

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act July 24, 1897 (30 Stat., 213), which directs that warehoused merchandise shall pay duties upon weight when entered. (R., 12–15.)

The Circuit Court held the proviso inapplicable because restricted to imported merchandise not entered before the act took effect, but sustained the Board on the ground that section 2983, Revised Statutes, prohibiting abatement of duties for loss by merchandise while warehoused, applied to diminution of weight caused by evaporation. (R., 17–19.)

The Circuit Court of Appeals held section 2983, Revised Statutes, applicable only to "actual reduction in the value or quantity of the merchandise" and inapplicable to loss of weight resulting from evaporation of moisture; and that duty should have been assessed on the weight at withdrawal, under section 20, customs administrative act of 1890 as amended by the proviso to act of 1902, which prescribes that warehoused merchandise may be withdrawn within three years on payment of the same *rate* of duties and charges imposed upon like articles imported at the time of such withdrawal.

IMPORTANCE OF QUESTION.

Tobacco when imported generally contains much moisture, which evaporates in a warehouse, causing loss in weight from 2 to 10 per cent, according to circumstances.

Duties on leaf tobacco for 1905 amounted to nearly $20,000,000. Most of it was warehoused in this country, and if duty is assessed upon weights at withdrawal,

hereafter all of it may be. Under the decision of the Circuit Court of Appeals on leaf tobacco alone officials of the Treasury Department estimate that the Government will certainly lose in excess of $500,000—possibly more than $1,000,000—annually; duties on other articles, especially wool, sugar, skins, hides, etc., containing much moisture, will materially decrease.

There are now pending before the Board of General Appraisers 8,252 protests on tobacco, 1,598 on wool, and some on sugar, awaiting the result of this case.

From 1890 to 1897 frauds were practiced on the customs by extracting from the warehouse parts of the merchandise and then claiming allowance for loss. One purpose of Congress in 1897 when it changed the rule and required weights to be ascertained upon entry was to prevent such fraud.

Because of the serious loss of revenue which will result if the decision of the Circuit Court of Appeals is acquiesced in and also because of the conflicting views of the tribunals below as to the law a review by this court seems especially important.

STATUTES.

Before the act of October 1, 1890, tobacco, when withdrawn from a warehouse, paid duty on its weight at entry. This action of executive officers was not questioned. That act (26 Stat., 624) provided:

> SEC. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for

> which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported respectively after that day: *Provided*, That any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: *Provided further, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal.*

May 4, 1891, Attorney-General Miller held the last proviso was not restricted to the subject-matter of the section—merchandise imported before the act took effect—but was of general application. (20 Op. A. G., 81.) This construction was followed until the act of July 24, 1897 (30 Stat., 213), which provided:

> SEC. 33. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered

> without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof: *Provided, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.*

The Board of General Appraisers, July 14, 1898 (T. D., 19715), held the proviso to section 33, act 1897, superseded the last proviso to section 50, act 1890, and, like that, was of general application (R., 13–15). Importers acquiesced until this case.

Section 20, customs administrative act, June 10, 1890 (26 Stat., 140) provides:

> Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importion, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided,* That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

The act of December 15, 1902 (32 Stat., 753), was passed to amend section 20, customs administrative act of 1890, and provides that such section shall read :

> SEC. 20. That any merchandise deposited in any public or private bonded warehouse may

> be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal: And provided further,* That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

This section originated in section 1, act March 14, 1866 (14 Stat., 8), and was carried into the Revised Statutes as follows:

> SEC. 2970. Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges.

In *Merritt* v. *Cameron* (137 U. S., 542, 550, 551), this court said section 2970 was "intended to provide for cases in which a change in the rate of duty had been made by statute while the merchandise was in

the bonded warehouse;" that under both of its clauses duties were to be assessed at the rate in force at withdrawal, the only difference being a 10 per cent increase when the merchandise was withdrawn under the second clause.

Section 20, customs administrative act, June 10, 1890 (26 Stat., 131), reenacted the first clause of section 2970, Revised Statutes, omitted the second clause, and added a proviso immaterial here.

Section 54 of the tariff act of October 1, 1890 (26 Stat., 624), reenacted section 20 with an amendment not material here.

The act of December 15, 1902, amended the section by inserting a new proviso as shown above, which was held in *Mosle* v. *Bidwell* (130 Fed., 334) to declare the meaning of the original provisions.

Rev. Stats., sec. 2964.

> In all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, or whenever the owner, importer, or consignee shall make entry for warehousing the same, in writing, in such form and supported by such proof as shall be prescribed by the Secretary of the Treasury, the merchandise shall be taken possession of by the collector, and deposited in the public stores, or in other stores to be agreed on by the collector or chief revenue officer of the port, and the importer, owner, or consignee, such stores to be secured under the joint locks of the inspector and importer, there to be kept with

due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order, upon payment of the proper duties and expenses, to be ascertained on due entry thereof for warehousing, and to be secured by a bond of the owner, importer, or consignee, with surety to the satisfaction of the collector in double the amount of the duties, and in such form as the Secretary of the Treasury shall prescribe.

Rev. Stats., sec. 2983.

In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse.

Rev. Stats., sec. 2984.

The Secretary of the Treasury is hereby authorized, upon production of satisfactory proof to him of the actual (industry) (injury) or destruction in whole or in part of any merchandise, by accidental fire, or other casualty, while the same remained in the custody of the officers of the custom in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the

same have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereon; and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be.

ARGUMENT.

I.

The proviso to Section 33, Act of July 24, 1897, is of general application.

This proviso is identical with the second one to section 50, act October 1, 1890, except the word "entry" is substituted for "withdrawn."

The construction by the Attorney-General giving general application to the proviso in the law of 1890 accepted during the seven years it remained in force, was adopted by Congress in the law of 1897 and has been followed since that time by the customs officers.

The general application uniformly given these provisos for the last sixteen years by Executive Departments should not be overruled except for most cogent and persuasive reasons.

Robertson v. *Downing*, 127 U. S., 607.
United States v. *Healy*, 160 U. S., 136.

The tariff act of 1897, as it passed the House, provided a duty of $2 per pound upon unstemmed leaf tobacco; the Senate reduced the duty to $1.75.

In conference the rate was fixed at $1.85 and the proviso to section 33 inserted (H. R. bill 379, 55th Cong., 1st sess.).

This proviso though applying to all weighable merchandise was enacted with special reference to tobacco, which is chiefly affected by it. The intention of Congress to have the proviso apply to merchandise thereafter imported, and not confined merely to goods already imported, is clear.

In 1900 a bill providing for payment of duties on tobacco according to weight at withdrawal from the warehouse was considered by the House Committee on Ways and Means. The president of the Cigar Leaf Tobacco Board of Trade of the United States, urging passage of the bill, said (hearings before Committee on Ways and Means, Fifty-sixth Congress, first session, March 7, 1900):

> * * * The necessity for its introduction is to correct an injustice done the tobacco and cigar industry of the United States by the substitution of one word for another in the act of July 24, 1897 * * *.
>
> Previous to the passage of this act duties had been levied in accordance with section 50 of the act of October 1, 1890 * * *.
>
> You will note that the only difference in the wording of the two sections is in the substitution of the word "entry" in the act of 1897 for the word "withdrawn," which was in the act of 1890, and this substitution of one word for another has seriously affected the tobacco and cigar, warehouse, and insurance interests of the country. * * *

> The CHAIRMAN (Mr. Payne). I remember very distinctly when this change was made in the conference committee it was represented by the United States officials that the duty had been provocative of very great frauds on the revenue; that tobacco not only shrank in weighing in drying out, but it shrank from some other reasons, and it was charged that tobacco, sugar, and some other commodities disappeared from the bonded warehouse, and when they came to weigh out there was a great shrinkage. That was the charge made by the United States officials and the reason the change was made back to the old law prior to 1890.

To give this proviso general application conforms to the principles of statutory construction.

In *United States* v. *Whitridge* (197 U. S., 135, 143), this court said:

> While, no doubt, the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause, we can not forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.

In *United States* v. *Downing* the Circuit Court of Appeals for the Second Circuit (January 10, 1906) held a proviso to paragraph 626 of the tariff act of 1897 providing for a countervailing duty upon crude

petroleum and its products was general in its application, and included products of crude petroleum other than those mentioned in the preceding part of the paragraph, and said:

> It is, no doubt, the general rule that a proviso to a particular section does not apply to other sections, and that it is to be construed with reference to the immediately preceding parts of the clause to which it is attached. But such a rule is not controlling, especially in such composite structures as tariff and appropriation acts.

A separate section (5) of the Philippine tariff act of March 8, 1902 (32 Stat., 54), provides that when duties upon merchandise imported from the Philippines "are based upon the weight of merchandise deposited in any public or private bonded warehouses, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry." This amounts to a legislative construction of the proviso to section 33, act of 1897. Congress did not intend to prescribe a different rule on that subject as to imports from the Philippines and those from foreign countries.

II.

Section 20, Act June 10, 1890, as amended in 1902, relates to the rate of duty, and not the time when the weight shall be ascertained.

The purpose of this section was to prescribe a rule applicable to warehoused goods in case of change

of tariff rates, as for example if the President should suspend the ordinary rate under section 3, or a reciprocity treaty should be negotiated under section 4, act 1897, or a special act should be passed.

Construing section 2970, Revised Statutes, from which section 20 was taken, Mr. Justice Lamar for the court said in *Merritt* v. *Cameron* (137 U. S., 542, 550, 551):

> *In our opinion that section was intended to provide for a case in which a change in the rate of duty had been made by statute while the merchandise was in the bonded warehouse.* (*Fabbri* v. *Murphy*, 95 U. S., 191; act of March 14, 1866, 14 Stat., 8, c. 17.) The first clause of the section means simply that if there had been a *change in the rate of duty* after the merchandise has been entered in bond, and the withdrawal of the merchandise takes place afterwards and within one year from the date of the importation, the duties to be paid are such as are fixed by the law in force at the date of the withdrawal. The second clause of section 2970 provides that if the merchandise remain in the bonded warehouse more than one year it may be withdrawn for consumption at any time within three years upon the payment of the duties and charges assessed upon the original entry and 10 per centum in addition. The phrase "duties assessed on the original entry," etc., evidently means the duties on the original entry as finally ascertained and liquidated within the meaning of those terms, as used in section 2931. In either case, if the statute *changing* the rate of duties goes into effect after

> the liquidation of the original entry, a reliquidation must necessarily take place. *The two clauses of the section differ in one respect only, viz, in a 10 per cent increase of duties*, where the merchandise remains in the warehouse more than one year, and is withdrawn within three years from the date of importation. This construction renders the two sections of the statute harmonious.

Merritt v. *Cameron* was followed in *Saltonstall* v. *Russell* (152 U. S., 628, 633).

In the present case the Circuit Court of Appeals took a different view of these two clauses, saying that "in section 2970 the distinction is sharply drawn between duties * * * to which it may be subject by law at the time of withdrawal and duties assessed on the original entry."

Referring to *Mosle* v. *Bidwell, supra*, it said:

> We think this decision is conclusive upon the question herein. If other like goods had been imported at the time when these goods were withdrawn, duty would have been assessed thereon according to its weight at that time.

In that case the Circuit Court of Appeals held that under section 20 of the act of December 15, 1902, cigars imported from Porto Rico and warehoused prior to the ratification of the treaty of peace with Spain and withdrawn after the ratification but before the passage of the Foraker Act, were entitled, like other goods imported at the time of withdrawal, to be free from duty. Clearly that case involved an entirely different question, and is inapplicable to the question

raised here. The *amount* of duty is one thing—the *rate* another. Like tobacco imported at the time of withdrawal of this, paid the same rate.

In *Hartranft* v. *Oliver* (125 U. S., 525), and other cases relied upon by the importer, there had been a change in the rate of duty before the goods passed out of Government control.

III.

If the proviso to Section 33, Act 1897, is inapplicable, nevertheless the tobacco was dutiable upon its weight at withdrawal.

Duties accrue when imports arrive at port of entry. The debt is then due, although a statute may make it payable afterwards. (*Saltonstall* v. *Russell, supra.*)

> Duties are required by law to be assessed on the goods, and the assessment is uniformly made on the quantity entered at the custom-house, without any allowance whatever for the ordinary leakage and deterioration. (*Belcher* v. *Linn*, 24 How., 508, 525; *American Sugar Refining Co.* v. *United States*, 181 U. S., 610.)

In *Merritt* v. *Cameron* (137 U. S., 542, 549, 550), Mr. Justice Lamar, for the court, said:

> We find nothing in the statutes or in any of the decisions of this court warranting the construction contended for by the defendants in error, that the ascertainment and liquidation of the duties referred to in section 2931 should be made at the date of the final withdrawal of the merchandise from the bonded warehouse. On the contrary, we think the ascer-

tainment and liquidation of the duties on merchandise entered in bond for warehouse should follow, in the regular course of business, as soon after the entry as is convenient, just as in the case of merchandise entered for immediate consumption. The statutory regulations as to the ascertainment and liquidation of duties are the same in the one instance as in the other. The measurement, weighing, or gauging of the merchandise, the inspection and appraisal of it, and the determination of its dutiable value are required to be proceeded with exactly the same in each instance. After the ascertainment of those facts in relation to the entry the collector has to decide what the duties are in each case. His decision at that time is the ascertainment and liquidation of the duties referred to in section 2931; and there would seem to be no good reason for his delaying that decision in the case of merchandise entered in bond for warehouse until the convenience of the importer shall suggest the removal of the merchandise from the warehouse.

Section 2890, Revised Statutes, provides that where duties are based upon weight or measure the weighers shall within three days after discharge of a vessel make return upon the articles weighed or measured by them.

Section 2882, Revised Statutes, prohibits removal of merchandise without permission before it has been weighed or measured.

Section 2964, Revised Statutes, expressly provides that duties on warehoused merchandise shall "be ascertained on due entry thereof for warehousing."

These decisions and statutes clearly show Congress intended to require merchandise to be weighed and measured immediately upon arrival, and duties assessed according to its condition at that time. There is no provision of law for reweighing or remeasuring.

Sections 2983 and 2984, Revised Statutes, show that no allowance or abatement of duty can be made in any case, where goods are warehoused, except for accidental fire or other casualty.

It is said the word "loss" in section 2983 does not include loss occasioned by the evaporation of moisture from tobacco. But construing sections 2983 and 2984 together it is plain that 2983 refers to every loss except that occasioned by accidental fire or other casualty.

Loss of liquor by evaporation is within section 2983. (Treas. Dec., 15400.)

Change of condition from that of uncleaned rice to a by-product is a deterioration within the meaning of section 2983. (21 Op. A. G., 474.)

In this case a certain lot of tobacco went into warehouse which weighed less when it came out. What became of the difference? It was lost, or it leaked, or it was damaged, injured, or deteriorated. It certainly disappeared. And if it disappeared, no matter by what means, it must be lost. No amount

of explanation as to how or why it disappeared could take such disappearance out of the meaning of one of the five words embraced in section 2983.

In *Seeberger* v. *Wright & Lawther Co.* (157 U.S., 183), it was held that an allowance should be made at the time of entry for impurities which are no part of the merchandise and the amount of which can be readily ascertained. The merchandise referred to in that case was uncleaned flaxseed, containing clay, sand, and gravel.

On the other hand, it was held in *Earnshaw* v. *Cadwalader* (145 U. S., 247) that iron ore, containing in its commercial state a certain amount of moisture, was taxable upon its weight with the moisture included.

The present case is more analogous to *Earnshaw* v. *Cadwalader* than to the *Seeberger* case. Leaf tobacco when imported contains moisture. That must be regarded as its commercial state, and it is upon such tobacco, moisture included, that duty must be paid when entered for consumption.

Here no allowance was claimed at entry. If the tobacco contained an unusual amount of moisture, claim should have been made then. Article 1276 of the Customs Regulations of 1899 provides for an allowance "whenever the weight of imported merchandise has apparently increased by the unusual absorption of sea water, or of moisture, while on the voyage of importation," if application is made within ten working days after landing the goods.

No allowance is made for ordinary moisture, nor for evaporation or shrinkage upon the voyage of importation (see *Robertson* v. *Bradbury*, 132 U. S., 500), except by express provision of law. Paragraph 393 of the tariff of 1897 provides that the duty upon wood pulp shall be upon its *dry* weight.

When Congress fixed the rate of duty it necessarily took into consideration that imported tobacco contains a certain amount of moisture and adjusted the duty with that fact in view.

Whether the proviso to section 33, act of 1897, is applicable or not, it is clear that the tobacco in question was dutiable upon its weight at entry, there being no statute authorizing reliquidation because of change in weight while goods are warehoused.

HENRY M. HOYT,
Solicitor-General.

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No. 259.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, PETITIONER,
v.
G. FALK & BROTHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The point in issue is whether upon withdrawal of imports from a bonded warehouse duties should be collected according to their weight then or on their larger weight when entered and introduced into the country, the loss having been occasioned by evaporation of moisture.

In the year 1902 respondents imported at New York, entered, and warehoused certain tobacco. They withdrew it in 1904, and the collector then demanded duty according to weight at original entry. Respondents protested, claiming that the weight at withdrawal should govern (R., 5, 6),

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the loss having been occasioned by evaporation of moisture while in the warehouse.

The Board of General Appraisers sustained the collector's action under the proviso to section 33, tariff act 1897 (30 Stat., 213) (R., 7), which reads:

> *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

The Circuit Court held the quoted proviso inapplicable because restricted to imported merchandise not entered before the tariff act of 1897 took effect, but sustained the Board's action (R., 10) because of opinion that diminution of weight by evaporation was covered by section 2983, Revised Statutes, which provides:

> In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse.

The Circuit Court of Appeals held section 2983, Revised Statutes, applicable only "to actual reduction in the value or quantity of the merchandise" and inapplicable to loss of weight resulting from evaporation of moisture; and that duty should have been assessed according to weight at withdrawal, under section 20, customs admin-

istrative act 1890, as amended in 1902 (32 Stat., 753), which follows:

> SEC. 20. That any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal. * * *

Tobacco, when imported from beyond seas, generally contains considerable moisture, which evaporates in a warehouse, causing loss in weight of from 2 to 10 per centum. Duties on leaf tobacco in 1905 amounted to nearly $20,000,000. Most of it was warehoused in this country, and if duty is assessed on weight at withdrawal hereafter all may be. Under the decision of the court below, on leaf tobacco alone Treasury officials estimate the Government revenues will lose more than $1,000,000 annually; duties on other articles, especially wool, sugar, hides, etc., containing much moisture, will materially decrease.

More than 15,000 protests are now pending before the General Appraisers.

From 1890 to 1897 frauds were practised on the customs by extracting from warehouses parts of

merchandise and then claiming allowance for loss. One purpose of Congress in 1897, when it changed the rule and required weights to be ascertained upon entry, was to prevent such frauds.

STATUTES AND REGULATIONS.

Act 1799 (1 Stat., 673) required that duties should be paid or secured before the landing of imported merchandise.

The warehouse and bonding system, as it now exists, had its origin in the act of 1846 (9 Stat., 53), which provided that thereafter all duties should be paid in cash or the goods be deposited in a warehouse.

A large proportion of imports are first entered for warehouse and their export, transportation, and withdrawal has reached to great magnitude. The delay in the payment of duties permits importers to secure a market for their goods before paying charges, and the system was inaugurated for their advantage. (Elmes Law of the Customs, 267; *Saltonstall* v. *Russell*, 152 U. S., 628, 631.)

Act March 28, 1854, section 4, (10 Stat., 271) provided that merchandise might remain in warehouse for three years without paying duties and "that there shall be no abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage, sustained by any goods, wares, or merchandise, while deposited in any public or private bonded warehouse established or

recognized by this act." The quoted provisions were carried into the Revised Statutes as section 2983 and are now in force.

Treasury Regulations for many years have required that when goods are entered for warehouse the duties shall be then ascertained and a bond given for payment. They have further permitted the owner to enter the warehouse, examine the goods, and take samples therefrom. Prior to October 1, 1890, duties were uniformly demanded and collected accord[illegible]o weights at original entry. (Customs R[illegible]ns 1884, art. 340, 458, 600, 668; 1899, art. 6[illegible]45.)

Tariff act of October 1, 1890 (26 Stat., 624):

> SEC. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported, respectively, after that day: *Provided*, That any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-

> one, upon the payment of duties at the rates in force prior to the passage of this act: *Provided further*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its *withdrawal*.

May 4, 1891, Attorney-General Miller held that the last proviso in the above-quoted section was not restricted to the preceding subject-matter—merchandise imported before the act took effect—but was of general application. He said (20 O. A. G., 81, 82):

> I am aware that under former tariff acts the rule has been to levy duties upon weighable merchandise according to the weight at the date of importation, but this proviso seems to be intended to change that rule, and there seems to be sufficient reason for such change.

This construction was followed by executive officers until the Dingley Act.

Tariff act July 24, 1897 (30 Stat., 213):

> SEC. 33. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been

> issued, shall be subjected to the duties imposed by this act and to no other duty upon the entry or the withdrawal thereof: *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its *entry*.

The Board of General Appraisers, July 14, 1898 (T. D., 19715), held that the proviso in section 33, act 1897, superseded the last one in section 50, act 1890, and was of general application. (R., 7.) Importers acquiesced until a recent date.

Customs administrative act June 10, 1890 (26 Stat., 140, 624), as amended by act of October 1, 1890, provides:

> SEC. 20. That any merchandise deposited *in bond* in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

The act of December 15, 1902 (32 Stat., 753), amended section 20, act of 1890, to read:

> SEC. 20. That any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original impor-

> tation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal: And provided further*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

The purpose of the act of December 15, 1902, was to give legislative interpretation to the earlier act. "The bill simply endeavors to conform the language of the section to the primary meaning and intent of the law and to accord with the custom and ruling of the Treasury Department." (Cong. Rec., Dec. 10, 1902; vol. 36, p. 200.)

In *Mosle* v. *Bidwell* (130 Fed., 334) the court declared the amendment simply exprest the real meaning of the original act.

The provisions of section 20, customs administrative act, originated in section 1, act March 14, 1866 (14 Stat., 8), carried into the Revised Statutes as follows:

Revised Statutes:

> SEC. 2970. Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal, and after

> the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges and an additional duty of ten per centum of the amount of such duties and charges.

In *Merritt* v. *Cameron* (1890; 137 U. S., 542, 550, 551) the court declared section 2970 was "intended to provide for cases in which a change in the rate of duty had been made by statute while the merchandise was in the bonded warehouse. * * * The two clauses of the section differ in one respect only, viz, in a ten per cent increase of duties, where the merchandise remains in the warehouse more than one year, etc." The court further said that liquidation of duties should not await withdrawal of goods for consumption, but should follow in the regular course of business as soon after entry as convenient, just as in the case of merchandise entered for immediate consumption.

Section 54, tariff act October 1, 1890 (26 Stat., 624), amended section 20, customs administrative act July 10, 1890, by inserting the words "in bond" just after the word "deposited" in the first line.

Revised Statutes:

> SEC. 2964. In all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, or whenever the owner, importer,

or consignee shall make entry for warehousing the same, in writing, in such form and supported by such proof as shall be prescribed by the Secretary of the Treasury, the merchandise shall be taken possession of by the collector and deposited in the public stores, or in other stores to be agreed on by the collector or chief revenue officer of the port and the importer, owner, or consignee, such stores to be secured under the joint locks of the inspector and importer, there to be kept with due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order, upon payment of the proper duties and expenses, *to be ascertained on due entry thereof for warehousing*, and to be secured by a bond of the owner, importer, or consignee, with surety to the satisfaction of the collector in double the amount of the duties, and in such form as the Secretary of the Treasury shall prescribe.

SEC. 2983. In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse.

SEC. 2984. The Secretary of the Treasury is hereby authorized, upon production of satifactory proof to him of the actual (industry) (injury) or destruction in whole or in part of any merchandise, by accidental fire or other casualty, while the same remained in the custody of the officers of the

> custom in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon. * * *

The act of Congress March 8, 1902 (32 Stat., 54), applicable to imports from the Philippines to this country and to imports into those islands, provides:

> SEC. 5. That when duties prescribed by this act are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

Tariff act 1897, paragraph 296.

> * * * *And provided further*, That there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits. * * *

United States v. *Alexander D. Shaw & Co.* (C. C., 141 Fed., 469); certiorari refused by Supreme Court, October 29, 1906.

ARGUMENT.

I.

The history of legislation on the subject shows the purpose of Congress to impose duties on imports according to their weight when entered for warehousing.

The act of 1854 specifically directed "that there shall be no abatement of duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any goods, wares, or merchandise whilst deposited in any public or private bonded warehouse established or recognized by this act," and so the law has remained until this day. To carry that provision into effect it was, of course, necessary to determine the weight or amount of goods at entry, and according thereto Treasury officials long collected duties.

No reason appears, e. g., why the Government should demand payment as for the full amount of liquor originally placed in a warehouse when upon withdrawal one-half had leaked and at the same time allow an importer of tobacco the benefit of the decreased weight of his goods.

The act of 1866 (sec. 2970, R. S.), in one clause, directed payment of "duties assessed on the original entry and charges," and in *Merritt* v. *Cameron* (137 U. S., 542) the court held both clauses contemplated collection according to weights at that time.

Prior to 1890 it was the uniform executive prac-

tise to collect duties upon weight at the time goods were entered for warehousing, and this was in entire harmony with the law. The customs administrative act of June 10, 1890, contained nothing inconsistent with the long-established practise. It did not, however, continue the requirement for a 10 per cent addition where goods remained in warehouse exceeding twelve months, and the second clause of section 2970, Revised Statutes, was accordingly omitted from section 20.

When the tariff act of October 1, 1890, was past, Congress, being cognizant of the established practise, for reasons deemed sufficient determined to change it, and accordingly inserted the last proviso in section 50—

> When duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its *withdrawal*.

A few months after the act of 1890 the Attorney-General (20 O. A. G., 81) held this proviso of general application, and thereafter until 1897 executive officers followed that construction and and goods were released upon payment of duty according to weights at withdrawal. Whether abstractly right or wrong, the opinion of the Attorney-General was accepted, acted upon, and treated as law for many years.

While the Dingley bill was before Congress the Treasury advised them of the extensive frauds made possible by permitting withdrawal according to weight at that time and earnestly recommended a change in the law. (See Appendix 1.)

When the act of 1897 was past Congress knew the practise which existed prior to 1890 and the change which followed that act, and also that during preceding years extensive frauds had resulted by reason of the changed practise. With such knowledge the former provision was deliberately altered. The proviso to section 33 declares:

> That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its *entry*.

After the act of 1897 Treasury officials restored the practise existing before 1890, and on July 14, 1898, the General Appraisers held the proviso in section 33, act 1897, general in application and sustained the officers. That opinion was acquiesced in for some years.

December 2, 1902, the United States Circuit Court in New York, in *Mosle* v. *Bidwell* (119 Fed., 480, 481), decided that under section 20, administrative act June 10, 1890, warehoused goods on withdrawal for consumption should pay duties at the same rate and amount as provided by the law

when imported and entered, notwithstanding there had been a change in rate or the goods given free entry. This opinion appeared entirely out of harmony with *Merritt* v. *Cameron* and in conflict with long practise and the general understanding of the law. In order immediately to nullify the consequences of it and insure administration in harmony with the practise and general understanding the Ways and Means Committee reported and recommended passage of a bill which within a fortnight became act of December 15, 1902.

It is manifest from the statements of the chairman and the report that the purpose was simply to insure administration in harmony with the practise existing prior to *Mosle* v. *Bidwell*, and that there was no intention to interfere with the requirement of payment according to weight at entry. (See Appendix 2.)

The judgment of the Circuit Court in *Mosle* v. *Bidwell* was reversed by the Circuit Court of Appeals (130 Fed., 334), the latter holding that the act of 1902 simply declared the real meaning of the act of 1890.

II.

To require payment of duties upon warehoused imports according to their weight at entry is not inequitable.

Tariff laws must of necessity be general in terms and can not be so molded as to produce precisely the same result in every case.

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The statutes require one who enters a cargo of tobacco for consumption to pay in cash according to its weight then, notwithstanding the presence of a large percentage of absorbed sea water. If on the same date a competitor, for his convenience and profit, enters a similar cargo for warehousing and secures three years within which to pay charges no good reason appears why he should obtain the further advantage of eliminating the sea water as an element in the reckoning.

How much moisture will evaporate from a cargo of tobacco while warehoused depends, of course, upon location. If in new Mexico the desiccation might be rapid and thoro, while if in New Jersey the amount of moisture might increase. In the practical administration of the law matters of this character can not be nicely considered.

If the weight of merchandise at withdrawal determines the duty, then importers of articles which by absorption of moisture from the air become heavier after entry might complain of injustice as bitterly as do the present respondents. Wool, for example, imported by rail from the dry regions of Mexico, after lying in a warehouse in New York for several months might become appreciably heavier than when entered and weighed on the border.

To require everybody to pay according to weight when the goods come into the country probably secures equal rights to all as nearly as practicable.

III.

The proviso in section 33, act of July 24, 1897, is of general application.

The proviso is identical with the second in section 50, act of October 1, 1890, except the word "entry" is substituted for "withdrawal."

The construction by the Attorney-General giving general application to the provisions in the act of 1890, followed during the years it remained in force, was adopted by Congress when the act of 1897 was past, and has been acted on since that time by customs officers. A construction accepted and acted on for sixteen years by the Executive Departments should not be rejected except for cogent and persuasive reasons.

Robertson v. *Downing* (127 U. S., 607).

United States v. *Healy* (160 U. S., 136).

The tariff bill of 1897, as it past the House, imposed a duty of $2 per pound on unstemmed leaf tobacco; the Senate reduced this to $1.75. In conference the rate was fixt at $1.85 and the proviso to section 33 inserted (H. R. 379, 55th Cong., 1st sess.).

This proviso, altho applying to all weighable merchandise, was enacted with special reference to tobacco. The intention of Congress to make it apply to merchandise thereafter imported, and not merely to goods already imported, seems clear.

In 1900 a bill providing for duties on tobacco according to weight at withdrawal from the ware-

house was considered by the Committee on Ways and Means. The president of the Cigar Leaf Tobacco Board of Trade of the United States, urging its passage, said (Hearings before Committee on Ways and Means, Fifty-sixth Congress, first session, March 7, 1900):

> * * * The necessity for its introduction is to correct an injustice done the tobacco and cigar industry of the United States by the substitution of one word for another in the act of July 24, 1897. * * *
>
> Previous to the passage of this act duties had been levied in accordance with section 50 of the act of October 1, 1890. * * *
>
> You will note that the only difference in the wording of the two sections is in the substitution of the word "entry" in the act of 1897 for the word "withdrawn," which was in the act of 1890, and this substitution of one word for another has seriously affected the tobacco and cigar, warehouse, and insurance interests of the country. * * *

The chairman (Mr. Payne) replied:

> I remember very distinctly when this change was made in the conference committee it was represented by the United States officials that the duty had been provocative of very great frauds on the revenue; that tobacco not only shrank in weighing in drying out, but it shrank from some other reasons, and it was charged that tobacco, sugar, and some other commodities disappeared from the bonded warehouse, and when they came to weigh out there was a great shrinkage.

> That was the charge made by the United States officials and the reason the change was made back to the old law prior to 1890. (See Appendixes 1 and 2.)

To give this proviso general application conforms to the principles of statutory construction. In *United States* v. *Whitridge* (197 U. S., 135, 143), this court said:

> While, no doubt, the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause, we can not forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.

In *United States* v. *Downing* (146 Fed., 56, 59) the Circuit Court of Appeals, Second Circuit, January 10, 1906, held a proviso to paragraph 626, tariff act 1897, providing for countervailing duty upon crude petroleum and its products, general in application and included products of crude petroleum not mentioned in the preceding part of the paragraph, and said:

> It is, no doubt, the general rule that a proviso to a particular section does not apply to other sections, and that it is to be construed with reference to the immediately preceding parts of the clause to which it is

attached. But such a rule is not controlling, especially in such composite structures as tariff and appropriation acts.

Section 5, act of Congress, March 8, 1902 (32 Stat., 54), to provide revenue for the Philippines, directs as to articles going into the islands or imported from them into this country, that when duties "are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry." This in effect was a legislative construction of section 33, act of 1897. Congress certainly did not intend to establish a rule as to imports from the Philippines less favorable than the one applicable to those from foreign countries.

The construction asked by the Government harmonizes with other requirements of the tariff law. (R. S., 2964.) One who finds his merchandise decreased by half at the end of the warehouse period by "injury, damage, loss, or leakage" (sec. 2983, R. S.) must nevertheless pay according to original weight. If a different rule applies where there is decrease in weight by evaporation of moisture a very clear declaration to that effect should exist. The act of 1897, par. 296, in terms provides that *no* allowance shall be made for leakage, etc., of spirits, altho it may occur before they are entered.

United States v. *Alexander D. Shaw & Co.* (141 Fed., 469); certiorari refused by Supreme Court October 29, 1906.

IV.

Section 20, act June 10, 1890, as amended in 1902, relates to rate of duty and not time when weight shall be ascertained.

The purpose of this section was to prescribe a rule applicable to warehoused goods in case of change in tariff rates, as, for example, if the President should suspend the ordinary rate under section 3, or a reciprocity treaty should be negotiated under section 4, act 1897, or a special act should be past.

Construing section 2970, Revised Statutes, from which section 20 was taken, Mr. Justice Lamar for the court said in *Merritt* v. *Cameron* (137 U. S., 542, 550, 551):

> *In our opinion that section was intended to provide for a case in which a change in the rate of duty had been made by statute while the merchandise was in the bonded warehouse.* (*Fabbri* v. *Murphy*, 95 U. S., 191; act of March 14, 1866, 14 Stat., 8, c. 17.) The first clause of the section means simply that if there has been a *change in the rate of duty* after the merchandise has been entered in bond, and the withdrawal of the merchandise takes place afterwards and within one year from the date of the importation, the duties to be paid are such as are fixed by

> the law in force at the date of the withdrawal. The second clause of section 2970 provides that if the merchandise remain in the bonded warehouse more than one year it may be withdrawn for consumption at any time within three years upon the payment of the duties and charges assessed upon the original entry and 10 per centum in addition. The phrase "duties assessed on the original entry," etc., evidently means the duties on the original entry as finally ascertained and liquidated within the meaning of those terms, as used in section 2931. In either case, if the statute *changing* the rate of duties goes into effect after the liquidation of the original entry, a reliquidation must necessarily take place. *The two clauses of the section differ in one respect only, viz, in a 10 per cent increase of duties*, where the merchandise remains in the warehouse more than one year, and is withdrawn within three years from the date of importation. This construction renders the two sections of the statute harmonious.

Merritt v. *Cameron* was followed in *Saltonstall* v. *Russell* (152 U. S., 628, 633).

In the present case (R., 18) the Circuit Court of Appeals took a different view of these two clauses, saying that "in section 2970 the distinction is sharply drawn between duties * * * to which it may be subject by law at the time of withdrawal and duties assessed on the original entries."

Referring to *Mosle* v. *Bidwell* (130 Fed., 334), it said:

> We think this decision is conclusive upon the question herein. If other like goods had been imported at the time when these goods were withdrawn, duty would have been assessed thereon according to its weight at that time.

In that case the Circuit Court of Appeals held that under section 20 of the act of December 15, 1902, cigars imported from Porto Rico and warehoused prior to the ratification of the treaty of peace with Spain and withdrawn after the ratification but before the passage of the Foraker Act were entitled, like other goods imported at the time of withdrawal, to be free from duty. Clearly an entirely different question was involved, wholly inapplicable here. The *amount* of duty is one thing—the *rate* another. Like tobacco imported at the time the imposts in question were withdrawn paid the same rate.

In *Hartranft* v. *Oliver* (125 U. S., 525), and other cases relied upon by respondent, there had been a change in the rate of duty before the goods past out of Government control.

V.

If the proviso to section 33, act 1897, is inapplicable, nevertheless the tobacco was dutiable according to its weight at entry.

Duties accrue when imports arrive at port of entry. The debt is then due, altho a statute

may make it payable afterwards. (*Saltonstall* v. *Russell*, *supra*.)

> Duties are required by law to be assessed on the goods, and the assessment is uniformly made on the quantity entered at the custom-house, without any allowance whatever for the ordinary leakage and deterioration. (*Belcher* v. *Linn*, 24 How., 508, 525; *American Sugar Refining Co.* v. *United States*, 181 U. S., 610.)

In *Merritt* v. *Cameron* (137 U. S., 542, 549, 550), Mr. Justice Lamar, for the court, said:

> We find nothing in the statutes or in any of the decisions of this court warranting the construction contended for by the defendants in error, that the ascertainment and liquidation of the duties referred to in section 2931 should be made at the date of the final withdrawal of the merchandise from the bonded warehouse. On the contrary, we think the ascertainment and liquidation of the duties on merchandise entered in bond for warehouse should follow, in the regular course of business, as soon after the entry as is convenient, just as in the case of merchandise entered for immediate consumption. The statutory regulations as to the ascertainment and liquidation of the duties are the same in the one instance as in the other. The measurement, weighing, or gauging of the merchandise, the inspection and appraisal of it, and the determination of its dutiable value are required to be proceeded with exactly the same in each instance. After the ascer-

> tainment of those facts in relation to the entry the collector has to decide what the duties are in each case. His decision at that time is the ascertainment and liquidation of the duties referred to in section 2931; and there would seem to be no good reason for his delaying that decision in the case of merchandise entered in bond for warehouse until the convenience of the importer shall suggest the removal of the merchandise from the warehouse.

Section 2890, Revised Statutes, provides that where duties are based upon weight or measure the weighers shall within three days after discharge of a vessel make return upon the articles weighed or measured by them.

Section 2882, Revised Statutes, prohibits removal of merchandise without permission before it has been weighed or measured.

Section 2964, Revised Statutes, expressly directs that duties on warehoused merchandise shall "be ascertained on due entry thereof for warehousing."

These decisions and statutes show that Congress intended to require merchandise to be weighed and measured immediately upon arrival and duties assessed according to condition at that time. There is no provision of law for reweighing or remeasuring.

Sections 2983 and 2984, Revised Statutes, show that no allowance or abatement of duty can be made in any case where goods are warehoused, except for accidental fire or other casualty.

It is said the word "loss" in section 2983 does not include the evaporation of moisture from tobacco. But construing sections 2983 and 2984 together it is plain that 2983 refers to every loss except that occasioned by accidental fire or other casualty.

Loss of liquor by evaporation is within section 2983. (Treas. Dec., 15400.)

Change of condition from that of uncleaned rice to a by-product is a deterioration within the meaning of section 2983. (21 Op. A. G., 474.)

In the case under discussion a certain lot of tobacco went into warehouse and lost weight while there. What became of the difference? It was lost, or it leaked, or it was damaged, injured, or deteriorated. It certainly disappeared. And if it disappeared, no matter by what means, it must be lost. No explanation as to how or why it disappeared could take the disappearance out of the meaning of one of the five words embraced in section 2983.

In *Seeberger* v. *Wright & Lawther Co.* (157 U. S., 183), it was held that an allowance should be made at the time of entry for impurities which are no part of the merchandise and the amount of which can be readily ascertained. The merchandise referred to in that case was uncleaned flaxseed, containing clay, sand, and gravel.

On the other hand, it was held in *Earnshaw* v. *Cadwalader* (145 U. S., 247), that iron ore, contain-

ing in its commercial state a certain amount of moisture, was taxable upon its weight with the moisture included.

The present case is more analogous to *Earnshaw* v. *Cavendaler* than to the *Seeberger* case. Leaf tobacco when imported contains moisture. That must be regarded as its commercial state, and it is upon such tobacco, moisture included, that duty must be paid when entered for consumption.

Here no allowance was claimed at entry. If the tobacco contained an unusual amount of moisture, claim should have been made then. Article 1276 of the Customs Regulations of 1899 provides for an allowance "whenever the weight of imported merchandise has apparently increased by the unusual absorption of sea water, or of moisture, while on the voyage of importation," if application is made within ten working days after landing the goods.

No allowance is made for ordinary moisture, nor for evaporation or shrinkage upon the voyage of importation (see *Robertson* v. *Bradbury*, 132 U. S., 500), except by express provision of law. Paragraph 393 of the tariff of 1897 provides that the duty upon wood pulp shall be upon its *dry* weight.

When Congress fixt the rate of duty it necessarily took into consideration that imported tobacco contains a certain amount of moisture and adjusted the duty with that fact in view.

Whether the proviso to section 33, act of 1897,

is applicable or not, it is clear that the tobacco in question was dutiable upon its weight at entry, there being no statute authorizing reliquidation because of change in weight while goods are warehoused.

I respectfully ask that the judgment of the court below be reversed.

J. C. McReynolds,
Assistant Attorney-General.

November, 1906.

Appendix 1.

Fifty-fifth Congress, first session—H. R. 379.—The Dingley Bill.

Mar. 18, 1897.—Reported to the House from the Committee on Ways and Means.
Mar. 31, 1897.—Passed the House.
Apr. 1, 1897.—Referred to Senate Committee on Finance.
May 4, 1897.—Reported to the Senate with amendments.
July 7, 1897.—Passed the Senate with amendments.

Office of the Collector of Customs,
Port of New York, May 4th, 1897.

Dear Mr. Howell: On April 19th I sent you a memorandum suggesting amendments to the pending revenue bill, in which I called particular attention to the proviso in the section proposed to be inserted, which proviso was intended to reverse the second proviso of section 50 of the act of October 1, 1890. I then called attention to the fact that the differences in weight between the importation and the withdrawal of merchandise indicated that the Government had suffered material loss of revenue through illicit abstractions of portions of the contents. I now send you a further memorandum that will illustrate my meaning. Six bonds covering Havana tobacco (filler) and also six bonds covering Sumatra tobacco (wrapper) imported in the year 1895 were selected at random and a full statement given as per memorandum. It is believed that these several bonds present a

fair sample of the conditions of other importations of tobacco during that year.

To this specific information I have added a memorandum showing the number of bales of Havana tobacco and also of Sumatra tobacco imported during the year 1895, together with the loss in duty based upon the average found from the bonds fully reported upon as above. You will note that on 3,020 bales of filler tobacco there was an actual loss to the Government of $6,998.11 in duties; while on 657 bales of wrapper tobacco there was an actual loss of $6,793.39. Carrying this ratio of loss to the importations of the year gives us a loss upon filler tobacco of $273,382.79, and on wrapper tobacco of $197,121.95, or a total of $470,504.74—this upon the item of tobacco alone.

You will readily see how important it is that this matter should be remedied, in view of the fact that the proposed act greatly increases the volume of merchandise that will be subject to specific duties, and hence, unless the law is changed, subject to reweighing on withdrawal from warehouse.

Respectfully, yours,

J. J. COUCH,
Special Deputy Collector.

Hon. W. B. HOWELL,
Assistant Secretary of the Treasury,
Washington, D. C.

[Enclosed in letter of May 4, 1897.]

Memorandum showing loss in revenue on tobacco reweighed in bonded warehouse at port of New York.

HAVANA TOBACCO (FILLER).

Bond No.	Date of arrival.	No. of bales.	Landed weight.	Weight when withdrawn.	Loss in weight.	Loss in duty.
59880	Oct. 28, 95	537	67, 987	64, 443. 57	3, 543. 43	$1, 240. 20
50256	May 27, 95	386	49, 633	46, 228. 30	3, 404. 70	1, 191. 65
59005	Oct. 14, 95	434	62, 381	58, 987. 316	3, 393. 684	1, 187. 79
56793	Sept. 9, 95	530	65, 803	62, 210	3, 593	1, 257. 55
56981	Sept. 12, 95	559	70, 982	67, 806. 4286	3, 135. 5714	1, 097. 45
55569	Aug. 17, 95	574	72, 190	69, 265. 8	2, 924. 2	1, 023. 47
		3, 020				6, 998. 11

SUMATRA TOBACCO (WRAPPER).

50329	May 27, 1895	18	3, 048	2, 931. 06	116. 94	$175. 41
49371	May 13, 1895	46	8, 119. 25	7, 845. 53	273. 72	410. 58
49759	May 20, 1895	306	53, 167. 75	51, 230. 897	1, 936. 853	2, 905. 28
49325	May 13, 1895	122	21, 740. 25	20, 942. 27	797. 98	1, 196. 97
49374	May 13, 1895	49	8, 504. 25	8, 215. 97	288. 28	432. 42
49370	May 13, 1895	116	19, 349. 75	18, 234. 5967	1, 115. 1533	1, 672. 73
		657				6, 793. 39

IMPORTED DURING YEAR 1895.

	Bales.	
Havana.....	117, 977—Loss in duty on above percentage.	$273, 382. 79
Sumatra.....	19, 064—Loss in duty on above percentage.	197, 121. 95
	137, 041	470, 504. 74

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, May 26, 1897.

SIR: I had the honor on the 8th instant to send with my approval a copy of a letter received from J. J. Couch, esq., special deputy collector of customs at New York, in regard to the propriety of

amending the pending tariff bill so as to dispense with the weighing of imported merchandise when withdrawn from bond, as now required under the proviso to section 50 of the tariff act of October 1, 1890.

As this question is of great importance, not only to the revenue but to the convenience in the administration of customs law, I take the liberty of recalling the matter to your attention, and inclose for your information another copy of Mr. Couch's letter, the terms of which I cordially approve.

It is found that a serious diminution in the revenue results from the practice above referred to. In one case which recently occurred on the withdrawal of certain tobacco the difference between the weight on importation and that on withdrawal amounted to a diminution of about $500 in duties.

As all merchandise, except weighable merchandise, is assessed with duty on importation, there does not seem to be any valid reason why an exception should be made in regard to weighable goods. It is essential to the accuracy of customs accounts that weighing shall be done on the landing of goods, even in cases where the goods are warehoused, and weighing is again required on their withdrawal for consumption, and the weighing of successive portions of one invoice entails labor and loss of time, as well as probable loss of duty from the wastage or drying out of the goods in warehouse.

Respectfully, yours,

W. B. HOWELL,
Assistant Secretary.

To the CHAIRMAN COMMITTEE ON FINANCE,
U. S. Senate.

Appendix 2.

From Congressional Record, December 10, 1902, volume 36, Fifty-seventh Congress, second session.

(P. 197) Mr. Payne. Mr. Chairman, this bill is brought here to give a legislative interpretation to what is known as section 20 of the customs administrative act. Section 20 of that act, as it now stands in the law, is as follows:

"Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

Under that section of the statute it has been the invariable custom and ruling of the Treasury Department that when goods were imported from a foreign country and placed in a bonded warehouse for a period of time that at the time of their withdrawal the duty upon them should be the rate of duty then existing; that is, the rate of the duty existing at the time of the withdrawal from the bonded warehouse and not at the time of their importation, when they were placed in the bonded warehouse; and nobody had ever discovered but what this section of the statute meant just that and no more. But last week a case was decided in the District Court of the Southern District of New York, Judge Wallace rendering the opinion, in which the contrary was held. That case arose in regard to the importation of a cargo of sugar from

Porto Rico into the United States prior to the 11th of April. The date of the ratification of the Paris treaty was on the 11th, I think, and the importation was on the 4th of April prior to the ratification of the treaty with Spain.

* * * * *

* * * * *

(P. 199) MR. PAYNE. Mr. Chairman, I ask unanimous consent to extend my remarks on this bill by adding the report of the committee and having it printed in the Record.

* * * * *

[House Report 2802, Fifty-seventh Congress, second session.]

The Committee on Ways and Means, to whom was referred the bill (H. R. 15794) to amend section 20 of an act entitled "An act to simplify the laws in relation to the collection of the revenues," report the same back without amendment, recommending its passage.

This bill proposes to amend section 20 of said act, which reads as follows:

"SEC. 20. Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

Under this section the Secretary of the Treasury has invariably held that on a withdrawal of bonded

merchandise from the warehouse the duties to be collected are at the same rate as those existing at the time of the withdrawal and not at the time of the importation. Last week a case was decided in the Circuit Court of New York, which has been called to the attention of the committee by the following letter of the Secretary of the Treasury, viz:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"*Washington, December 8, 1902.*

"MY DEAR SIR: Section 20 of the customs administrative act is in the following language:

"'Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal.'

"Relying upon this section, it has been the practice of the Department to collect duty at the rate imposed by law at the time the goods are withdrawn from warehouse.

"I inclose herewith a copy of the decision rendered by the District Court of the United States for the Southern District of New York, where it is held that warehoused goods on withdrawal for consumption are dutiable at the same rate as when warehoused.

"By the recent act of Congress tea is admitted free after December 31, 1902. There is now in the several warehouses of the United States a very large amount of tea imported under the impression that it could be warehoused and withdrawn free after the 31st of December, 1902. It

does not lie with this Department to question the correctness of the decision quoted, and it must therefore collect duty according to the terms of the statute now in force.

"The question is of so great importance and so many merchants, both wholesale and retail, are interested therein that the Department deems it important to call special attention of Congress thereto, and it recommends a modification of the law, either by amending section 20, above quoted, or by special act allowing the free withdrawal of tea now in warehouse. Unless this is done it probably will be exported and much delay and litigation will ensue, for much of it has been sold to be delivered January 1, 1903, at a price ruinous to wholesale merchants.

"Very respectfully, L. M. SHAW.

"HON. SERENO E. PAYNE,
"*Chairman Ways and Means Committee,*
House of Representatives."

The case was argued on November 5, 1902, and the decision therein was handed down on December 2, instant.

The importation in this case consisted of sugar, by the steamship *Caracas*, on April 4, 1899, entered on that day for warehouse under the usual bond, duties unpaid. The goods remained in bonded warehouse until May 6, 1899, when they were withdrawn for consumption and duties then paid by the plaintiffs under protest. The protest claimed that the goods were not dutiable, because the treaty of cession with Spain had been ratified before the date of such withdrawal, and that at the time of such withdrawal Porto Rico

was not a foreign country, and that goods in warehouse were only liable to duty under laws existing at the time of their withdrawal. The amount of duties paid by the plaintiffs and sought to be recovered in this action of the defendant, as collector of the port of New York, was $1,442.24, with interest.

To the complaint of the plaintiffs in this action I interposed a demurrer on behalf of the defendant, that the said complaint did not state facts sufficient to constitute a cause of action.

The question of law in the case was whether the goods that were dutiable at the time of their original entry under the laws then existing were made nondutiable by being warehoused under bond and not withdrawn for consumption until after Porto Rico had been ceded to the United States by treaty with Spain.

After hearing argument, Judge Wallace reserved his decision until December 2 instant, when he handed down the following opinion:

"WALLACE, circuit judge.

"The demurrer to the complaint presents the question whether, under section 20 of the customs administrative act (act of June 10, 1890, as amended October 1, 1890), the collector of the port of New York was justified in requiring payment of duties upon imported merchandise at the rate and amount to which the goods were subject at the time of their importation and deposit in the bonded warehouse, or whether he was justified only in requiring payment of such duties as they would have been subject to if imported at the date of their withdrawal for consumption. The goods

consisted of sugars imported from Porto Rico. They were imported and entered for warehouse, and bonded April 4, 1899. The collector liquidated the duties thereon at $1,442.24, and it is to be assumed, in the absence of averments to the contrary, that at the time the goods were subject to duty in that amount.

"Subsequently, and on May 6, 1899, they were withdrawn for consumption, and the collector required payment for the duties as liquidated. The complaint avers that they were not subject or liable to any duty at that date because they were not imported from a foreign country into the United States within the meaning of any valid statute or Executive order of the United States. It is conceded by counsel that this averment means that before the sugars were withdrawn for consumption, the treaty of peace between the United States and Spain having been ratified, the sugars, being importations of Porto Rico, were not dutiable because Porto Rico was no longer a foreign country within the meaning of the tariff acts, according to the decisions of the Supreme Court of the United States.

"Section 20 of the customs administrative act provides as follows: 'That any merchandise deposited in bond in any public or private warehouse may be withdrawn for consumption within three years from the date on which they were originally imported on payment of the duties and charges to which it may be subject by law at the time of such withdrawal.'

"It is not disputed that the goods were subject to duty in the amount exacted of the plaintiffs when they were deposited in bond. Being then

subject to these duties, they remained so in the absence of any treaty or statute of Congress relieving them from duty. No such treaty or statute is invoked, but the argument is that the section means to allow the withdrawal of dutiable goods upon the payment of such duties as they would have been subject to if they had been imported at the time of the withdrawal. The language of the section does not require such a construction. It requires payment of the duties to which the goods are lawfully subject at the time of the withdrawal. This means the duties which have become an accrued liability. Duties accrue at the date of the importation and entry of merchandise, and on that date a lien attaches to the goods and a debt for the amount accrues from the importer to the Government. Warehousing is a privilege given by statute to which the section relates by which, in lieu of compelling the importer to make immediate payment of his debt, he is permitted to postpone payment until he withdraws the merchandise from the warehouse for consumption. The privilege is not conferred in order that he may thereby escape, by some contingency, the payment of his debt. It does not contemplate giving him an advantage in that regard over other importers who pay their duties upon the entry of their goods.

"Warehoused goods on withdrawal for consumption pay duties at the same rate and amount as provided by law when imported and entered, unless there is some provision of the existing tariff laws or in subsequent legislation by Congress providing for the payment of a different rate or amount, and applicable to the goods in warehouse. The United States have never been divested of their right to

the duties which accrued when the goods were imported and warehoused, because neither the treaty of peace by any of its provisions nor any statute passed subsequently to the one imposing the duty has impaired or affected that right.

"None of the decisions of the Supreme Court cited for the plaintiffs conflict with the conclusions thus reached. The observations in the opinions are to be read as addressed to the facts of the particular case under consideration by the court, and so read contain nothing to sanction the argument for the plaintiffs.

"Judgment is ordered for the defendant."

In repealing the war tax at the last session there was included in that repeal a duty of 10 cents a pound upon tea, which is to take effect by the terms of said repealing act on the 1st day of January, 1903. Under the practice of the Treasury Department this would have relieved entirely from duty all teas imported and remaining in bonded warehouses and withdrawn after the 1st of January. But under the decision of the court, and the change in the policy of the Treasury Department on account of said decision, such teas would now have to pay the duty of 10 cents a pound, unless such legislation as is proposed in the pending bill shall be enacted by Congress before the 1st of January.

Large quantities, and the committee is informed whole cargoes, of teas have been put in bonded warehouses since the passage of the repealing act, ready to be shipped after the 1st of January to supply the trade of the country. Wholesale and retail dealers, relying upon the construction here-

tofore placed upon section 20 by the Department, have run their stocks down to a very low point and must replenish them. It would seem that quantities of these teas have been sold in bond, so that the loss would affect not so much the importers as the wholesale and retail dealers in teas, as is evidenced by the following telegram received by the chairman of the committee, viz:

"NEW YORK, *December 9, 1902.*

"SERENO E. PAYNE,

"*House of Representatives, Washington, D. C.*

"Secretary of Treasury Shaw's late decision regarding duty to be collected upon teas in bond most serious matter, and would be disastrous to the tea and grocery trade in this country, who have purchased teas at five and seven cents per pound advance over previous year, and would now be compelled to pay 10 cents additional. Importers have largely protected themselves by selling in bond, but merchants through the country have agreed to deliver teas free after January 1.

"CARTER, MACY & Co."

New teas will be coming in early in the year, and without change in the existing law unequal burdens would be thrown upon the trade.

The bill simply endeavors to conform the language of the section to the primary meaning and intent of the law, and to accord with the custom and ruling of the Treasury Department. There is no reason why any merchandise imported and placed in bonded warehouses should pay a higher or different rate of duty than that imposed upon like merchandise imported at the time of the with-

drawal of the former, as both enter the market under the same circumstances and conditions of trade. The contrary rule would be liable at any time, in case of a change in tariff rates, to be a disturbing factor, and result in great loss.

The bill should be put upon its passage at the earliest opportunity, in order that the intention of Congress, both in the repeal of this war duty and in originally enacting what is known as the customs administrative act, may have their intended effect.

O

FILE COPY.

No. [redacted]259

No.

In the Supreme Court of the United States

OCTOBER TERM, 1905.

THE UNITED STATES,

Petitioner,

vs.

G. FALK & BROTHER,

Respondents.

Office Supreme Court
FILED
APR 23 190
JAMES

BRIEF FOR RESPONDENTS ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWARD S. HATCH,
J. STUART TOMPKINS,
Counsel for the Respondents.

APPEAL PRINTING COMPANY, 14-16 VESEY ST., NEW YORK

In the Supreme Court of the United States.

THE UNITED STATES,
Petitioner,

against

G. FALK & BRO.,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

Statement.

The merchandise which is the subject of this petition is leaf tobacco in bales. It was imported from Rotterdam on the Steamship Ryndam, and was entered at New York on June 2, 1902. The total importation consisted of thirty-one bales, numbered 2239 to 2269, inclusive. According to the consular invoice, which is a sworn document and presumptively correct, the gross weight of the thirty-one bales, at the time they left Rotterdam, was 2473.5 kilos. At the rate of 2.2046 pounds to the kilo this equals 5453.0781 pounds. According to the government weigher's return, which is like-

wise presumptively correct as to weight, the thirty one bales, at the time of landing, weighed 5,520 pounds. So that the bales in question had gained, on the voyage of importation, 66.9219 pounds.

(Note. It has always been found impracticable to print the invoice and entries in these custom cases, as will be obvious from an inspection, although it has always been agreed on both sides that they are a part of the record. The United States Attorney called upon the Collector for their production for use in the Courts below in this case, and we have accordingly called upon the Collector to file them in the office of the Clerk of this Court, for inspection, if necessary.)

The record in this case covers bales numbered 2243, 2244 and 2263 of the above importation. According to the Goverment weigher's return these bales weighed 178, 179 and 181 pounds respectively at the time of landing. These bales were withdrawn from bonded warehouse about one year after importation, and weighed at that time eight pounds less than at time of entry.

The question, therefore, presented in this case is one whether the moisture which such tobacco absorbs on the voyage of importation, and which disappears again, while it is in the custody of the government, and before it is delivered over to the importer to enter into the body of the merchandise of the country for consumption, is dutiable at the rate of $1.85 to the pound.

It is submitted that the statement made by the learned Soliciter General about the importance of this question by reason of possible loss of revenue is speculative, and wholly unwarranted by the record or experience. For example: In February,

1903, the United States Circuit Court held that silk ribbons were properly dutiable at 50% *ad valorem* instead of at 60% *ad valorem*, the rate theretofore imposed.

This decision (which according to Government reasoning in the case at bar, should have resulted in reduced revenue), instead of leading to a loss of revenue, caused an increase of $318,227.47 in revenue from silk ribbon importations for the year immediately following the decision.

So also the 20 per cent. reduction in duties on goods from Cuba caused the importation of $82,922,306 worth of dutiable merchandise in 1905, the first full fiscal year after the Reciprocity Treaty between the United States and Cuba went into effect; whereas, in 1903, the last full fiscal year previous to the operation of the treaty, only $59,827,983 worth of dutiable merchandise from Cuba was imported. In other words, although there was a 20 per cent. reduction in duties, the value of dutiable merchandise imported from Cuba increased approximately $23,000,000 during the above period (see Commerce and Navigation of the United States, 1905, p. 21 and p. 33).

Clearly it would have been fallacious for the Government to have estimated at the beginning of the 20 per cent. Cuban Treaty duty reduction that the revenue to be derived from imports from Cuba for the succeeding years would be lessened 20 per cent. So also in the present case we contend that the abolition of duty collections on water, not inherently or commercially a part of the taxable subject, tobacco, will not necessarily cause any loss of revenue, but is more likely to result in larger tobacco importations and increased revenue.

We respectfully predict that home interests will be benefited by the increased importations of the crude product, and the consequent encouragement and expansion of the American cigar manufacturing industry.

The Solicitor General at page 3 of his brief gives "serious loss of revenue" and "the conflicting views of the tribunals below as to the law" as the two reasons why "a review by this Court seems specially important."

For the reasons above stated, we submit that there will be no loss of revenue. And as to the alleged conflicting decisions, we need only say that the "conflict" is not between any two rulings of different Circuit Courts of Appeal, but merely between the unanimous decision herein of the Circuit Court of Appeals for the Second Circuit and of the *Circuit* Court of the Southern District of New York.

This is not one of those conflicts of decisions which this Court has stated justifies review.

In *Forsyth vs. Hammond*, *166 U. S.*, *506*, *514* Mr. Justice BREWER, speaking for this Court said:

> "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this Court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that Court. And further, that while this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and *only when the circumstances of the case satisfy us*

that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

It is further stated in the brief for the petitioner that there are 8,252 protests on tobacco now pending before the Board of General Appraisers, but it is to be borne in mind that protests under this topic are filed both at the time of entry and the time of withdrawal. In the present case for example, there were thirty-one bales entered upon which a protest was filed at the time of entry, and another each time that a bale or more was withdrawn, so that this one importation of thirty-one bales involves seventeen protests, and the 8,252 protests which usually would represent that many importations does not on the present issue represent by a great number so many importations as the statement contained in the petition would indicate without further explanation.

ARGUMENT.

I.

The principle of law which the Circuit Court of Appeals applied to the facts in this suit is clear, has long been settled and aquiesced in by the Treasury Department, and would seem to need no reiteration by this Court.

The principle which the Circuit Court of Appeals applied to the present case, was announced

by this Court in *Seeberger vs. Wright & Lawther Co., 157 U. S., 183.*

In that case the merchandise was flaxseed which was dutiable at twenty cents per bushel of fifty pounds. The proof in the case showed that the seed contained dust, composed of clay, sand and gravel to an average of four per cent. The collector refused to allow for the four per cent. of dust in computing the dutiable number of bushels at 50 pounds to the bushel. This Court held that an allowance should be made for such average four per cent. of dust, and that "twenty cents per bushel of fifty-six pounds" meant "56 pounds of clean seed, or at least seed freed from any 'accidental' impurities, such as the clay, sand and gravel in question.

Mr. Justice BROWN, delivering the opinion of this Court, said:

> "We think the Court below was correct in assuming that the flaxseed in question, which is made dutiable by the Act of 1883 at 'twenty cents per bushel of fifty-six pounds', less the tare, means fifty-six pounds of clean seed, or at least seed freed from any accidental impurities, such as the clay, sand and gravel in question. If this seed had been washed or otherwise cleansed of these impurities, it certainly will not be contended that they would be subject to an increased duty, by means of such cleansing, or that a bushel of 56 pounds of such seed would be anything more or less than a statutory bushel. So if, without such cleansing the amount of such impurities can be fixed at a certain percentage, as the findings in this case assume, we see no objection to the allowance being made, though the seed be not in fact cleansed" (157 U. S., p. 186).

So in the present case the sworn consular in-

voice, coupled with the United States weigher's return at the time of landing, shows that the 31 bales covered by the invoice acquired an accidental and temporary amount of moisture on the voyage of importation to the extent of 66 pounds.

The principle of the Seeberger case is much more clearly applicable to the present case for the reason that the importer proves by actual weight the amount of moisture which is absorbed and evaporates again before he gets his goods, whereas in the Seeberger case an average percentage only was shown, and the importer was delivered the gross weight of the flaxseed imported; but in the present case the added weight was only temporary, it was not present before the goods were shipped, nor was it present when they were withdrawn from bond. The water was an extraneous substance, which disappeared before the tobacco became incorporated with the general mass of property in the United States.

In other words, the water on which duty was here levied, did not constitute a part of the taxable subject or article of commerce, wrapper tobacco, originally, nor did it constitute a part of the wrapper tobacco, which went into consumption in the domestic markets.

The only paragraph under which duty can be imposed on this merchandise is Paragraph 213 of the Tariff Act of 1897, which, so far as pertinent reads:

> "Wrapper tobacco * * * if unstemmed,
> "One dollar and eighty-five cents per pound."

Clearly Congress did not intend to provide in Paragraph 213 for a duty of $1.85 per pound on "water" which did not go into consumption

when it provided for a duty of $1.85 per pound on "wrapper tobacco." We respectfully submit that even if it was within the constitutional power of Congress, it certainly was not the purpose of Congress to tax either air or water at any such exorbitant rate.

II.

The difference between the entered and withdrawal weights. of the bales in this case, did not represent a loss of the merchandise.

Section 2983 of the United States Revised Statutes reads as follows:

> "In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss or leakage sustained by any merchandise, while deposited in any public or private bonded warehouse."

It would seem to be a matter of common sense perception, rather than a matter of argument, that an accidental amount of moisture temporarily present in the bales at the end of a long sea voyage, does not, when it disappears again, constitute a "loss" of the merchandise.

The Circuit Court of Appeals found no difficulty in reaching a unanimous conclusion that such evaporation was not a loss of the tobacco. That is the real question in this case, and the numerous statutes, which the learned counsel for the petitioner seeks to construe, become immaterial, unless they show an intent on the part of the Congress to tax the moisture in question. No attempt is made, in the brief for the petitioner, to spell out

such an intent. On the contrary, an intent wholly irrelevant to this issue is sought to be shown, and the statutes therefore are not pertinent.

III.

The collector should have re-weighed the goods on withdrawal to correct his error in including a non-taxable subject in his weights at the time of entry.

The duty of $1.85 per pound on wrapper tobacco under the statute is only an unconditional and fixed duty as to tobacco entered for immediate consumption. That provision of the law is qualified by the provision which permits goods to be placed in bond.

When goods are placed in bond the time within which the duty becomes a fixed certainty does not expire until the date of that withdrawal, because if the duty increased for instance between its entry and its withdrawal from bond then $1.85 per pound does not apply as against the Goverment, and if the amount is not fixed against both the Government and the importer, then the amount is not finally fixed at $1.85 a pound for goods in bond until withdrawal.

Mosle vs. Bidwell (C C. A), 130 Fed. Rep., 334.

If the law were altered while goods are in bond, changing the manner of computation of duty, so that they would have to be re-weighed for the benefit of the Government, (for example, if the law were changed to make the weight of immediate coverings of tobacco dutiable, as is the

case of confectionery under Paragraph 212 of the Tariff Act,) then the weigher's return can only be final as to goods that are entered for consumption, and not placed in bond, and if the weigher's return is not final as against the Government, neither can it be said to be final as against the importer.

The facts in the present case show that it is not final, because at the time of withdrawal the collector did deduct from the weigher's return the actual and schedule tare. If he deducts the weight of the coverings from the weigher's return at the time of withdrawal, he should also deduct for the accidental moisture, which is no more dutiable than the coverings are. The collector having refused to re-weigh the goods to ascertain the amount of such moisture, and having insisted upon collecting duty on it at that time, the Circuit Court of Appeals held a cause of action arose against him, and protest was properly lodged at that time.

In *Lawder vs. Stone, 187 U. S., 281*, this Court held that a portion of a cargo of pineapples which had been reduced to slush, and which, therefore, ceased to be goods, wares and merchandise, was not dutiable, in spite of the provision of the law that no allowance should be made for "damage," unless it amounted to ten per cent. of the quantity imported. This Court further held that the provision with respect to damage had no application to the case inasmuch as the slush was not damaged goods, but not goods at all, and although the Government Examiner's return showed a certain number of pineapples imported, including an estimated number which he found by counting the tops in the slush, that the importer had a right to prove that

such return was incorrect in fact, and that a certain number of pineapples returned by the examiner had, in fact, been reduced to slush. In the present case the Government Weigher has returned a certain amount of accidental moisture for duty, and since such moisture is not goods, wares and merchandise, any more than the slush was in the pineapple case, the importer is entitled to show the amount of such accidental moisture returned by the Government Weigher for duty, although that fact cannot be ascertained until withdrawal.

IV.

Points in reply to the brief for the petitioner.

The United States Circuit Court of Appeals did not decide that the weight of imported tobacco at the time of its withdrawal in itself alone determined the amount of duties payable thereon, but that the cause of action does not arise until the withdrawal, for the reason that it is not known until then what is the actual amount of accidental moisture which is contained in the imported tobacco.

If the principles of law involved in the facts in this case are identical with the principles applied to the facts in the case of the dust in flaxseed, the numerous statutes which the counsel for the government sets forth in its petition would seem to be immaterial and irrelevant, for it might be granted that they all have the meaning for which he contends, and still this accidental moisture would not be dutiable any more than the acci-

dental dust in the flaxseed was. This Court said in that case that fifty pounds per bushel meant fifty pounds of clean seed. It may equally be said, in this case, that a pound of tobacco means the tobacco free from moisture acquired on the voyage of importation.

It is stated in the brief for the petitioner herein that "the amount of duty is one thing, the rate another, as if the same "rate" could be "collected" if the amount remained a constant, and the weight varied where the elements of rate are the unit of value and the unit of weight. Rate means ratio or proportion, so that $1.85 per pound means at the ratio of $1.85 to the pound. In the present case duties were collected on the tobacco contained in the three bales in question at the rate of $1.87, approximately, to the pound.

We admit the truth of the proposition of law stated in the heading to Point III of the brief for the petitioner, that the tobacco was dutiable upon its weight at "withdrawal" according to the facts of this case. No doubt the learned Solicitor General has had occasion to state the proposition so frequently in that form in the past that force of habit has rendered him blind to the fact that he is on the other side of the case for the moment.

It is further stated in the petition that:

> "In this case a certain amount of tobacco went into warehouse which weighed less when it came out. What became of the difference? It (the difference) was lost. * * * It certainly disappeared. And if it disappeared, no matter by what means, it must be lost."

The fallacy of the above argument lies in the promise that "a certain amount of *tobacco* went into wareh se." As a matter of fact a certain amount of tobacco, ***plus*** a certain amount of accidental moisture, went into warehouse; it is the moisture, constituting the difference, that has disappeared.

Reference is made to the loss of liquor by evaporation, but the distinction between such a loss, and that in the present case, is obvious, for in the case of the evaporation of liquor there is a loss of the thing in itself. In the present case there is not a loss of the tobacco.

It is stated no allowance was claimed at entry. The importers on this question have protested uniformly both at the time of entry and withdrawal. The opinion of the Circuit Court of Appeals shows that they regarded a protest at the time of entry premature, because no cause of action arose against the Collector until he refused to make allowance for the accidental moisture at the time of withdrawal. This is a matter of practice and does not affect the merits of the question.

The learned Solicitor-General cites Robertson vs. Bradbury, 132 U. S., 500, for the proposition that no allowance for ordinary moisture, nor for evaporation or shrinkage upon the voyage of importation should be made. In that case the goods were subject to an *ad valorem* duty. In the case at bar the duty is *specific*.

> "When the duty was specific on this article (sugar), being at a certain rate per pound, before the Act of 1846, it could, of course, ex-

tend to no larger number of pounds than was actually entered."

Marriott vs. Brune, et al., 9 How., 619, 631.
Lawder vs. Stone, 187 U. S., 281.

The learned Solicitor General cites the case of *Earnshaw vs. Cadwalader, 145 U. S., 247*, as controlling in this case. In that case the moisture found in the iron ore in question constituted an inherent part of it, and it was bought and sold in that condition to merchants. And this Court held, in effect, that in determining the dutiable weight of iron ore no deduction should be made on account of moisture and that it would be improper to ascertain the number of dutiable tons after first expelling the moisture by heating the ore to 212 degrees Fahrenheit, *because iron ore as known to the commerce of the United States was the ore in its natural state in respect to moisture.* The moisture in the ore case was an incident. The moisture in the present case is an accident. In the present case it was not the subject of a commercial transaction. It was neither bought, sold, nor delivered.

A different case and one governed by *Ernshaw vs. Cadwalader, supra*, would be made if after entry and before withdrawal the importer had, and took advantage of, the opportunity to drive off all moisture and create an abnormal dryness in the toba co. As a matter of fact, the sponge-like absorbent character of tobacco, and the fact that just before it is weighed at entry it has been through ocean transportation, gives to the Government an advantage quite as considerable and quite as inequitable as the importer sought to obtain in *Ernshaw's*

case; in the one case the importer sought to produce an abnormal and uncommercial dryness and minimum of weight to decrease duties, and in the other the Government seeks to take advantage of an accidental and unavoidable but abnormal and uncommercial amount of moisture and maximum of weight to increase duties.

The bonded warehouse in New York is not an unusually dry place, it has the temperature and other climatic conditions that obtain in the places where this tobacco is manufactured and where it is consumed. The decrease in weight that comes to the tobacco while in such warehouse is but the *normal elimination of a quantity of water that but for the ocean of transportation would not have been there at all*—that was not there when the exporter began the exportation and is not there when the importer receives and uses the importation.

If the flaxseed in the Seeberger case had been stored in bonded warehouse, and, in the process of handling, the dust had sifted out of the bags, which would have been a case precisely analogous to the present, we do not think this Court would have decided that case differently if the importer in that case had proved the actual amount of dust eliminated by weighing at the time of withdrawal, rather than claimed an average percentage at the time of entry. It would seem as if the Government counsel should have acquiesced in the claim of the importer in the present case, in view of its eminent fairness toward the Government, inasmuch as the importer only asked to be allowed for such moisture as he showed by actual weight at the time of withdrawal had disappeared, and which the Consular invoice showed he never bought.

V.

The unanimous decision of the Circuit Court of Appeals in the present case was right, and should receive the approbation of this Court by the denial of the present application.

Respectfully submitted,

EDWARD S. HATCH,
J. STUART TOMPKINS,
Counsel for the Respondents.

Dated New York, April 20th, 1906.

[9416]

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No. 259.

IN THE

Supreme Court of the United States.

October Term, 1906.

THE UNITED STATES,

Petitioner,

v.

G. FALK & BROTHER,

Respondents.

BRIEF FOR RESPONDENTS.

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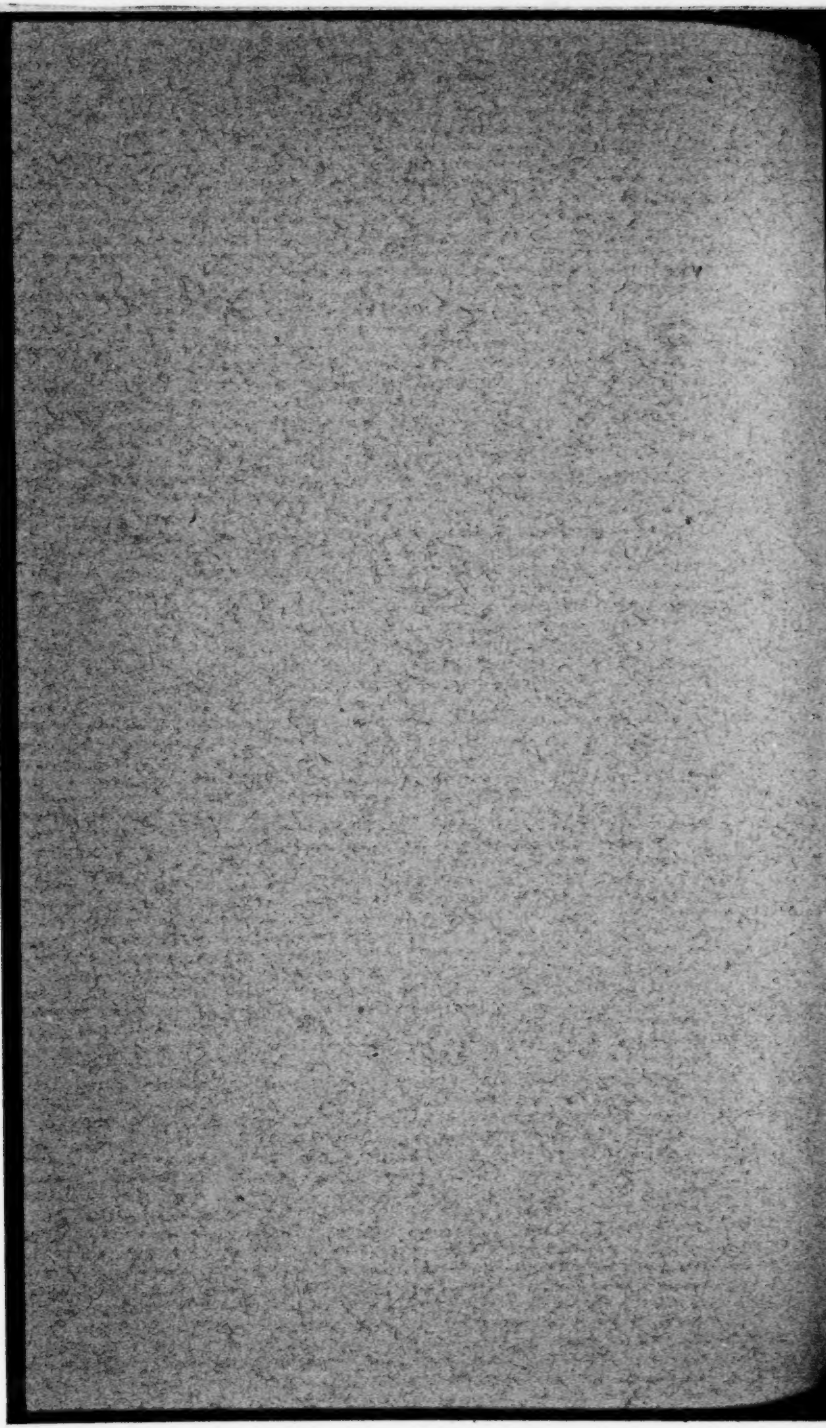

Supreme Court of the United States.

THE UNITED STATES,
Petitioner,

against

G. FALK & BROTHER,
Respondents.

Brief for Respondents.

This appeal comes before this Court on writ of certiorari granted on the application of the United States, on April 30th, 1906.

On undisputed facts the case presents but one question of law, namely, whether the duty on imported tobacco deposited in bonded warehouse should be assessed on its weight plus moisture at the time of entry, or on its weight at time of withdrawal, where, while the goods are in the warehouse, evaporation occurs of the moisture acquired on the ocean voyage.

The tobacco in question was imported from Rotterdam on June 2d, 1902. The total importation consisted of thirty-one bales, numbered 2239 to 2267 inclusive. According to the con-

sular invoice, which is a sworn document and presumptively correct (Greely vs. Thompson, 10 How., 225. 239, 13 L. Ed., 397; U. S. vs. May, 26 Fed., Cas. 1225, One hundred and twenty-three packages of glass, 18 Fed. Cas., 709, 711), the gross weight of the thirty-one bales at the time they left Rotterdam was 2,473.5 kilos =5453.0781 pounds. According to the Government weigher's return (see same attached to entry), the thirty-one bales at the time of landing weighed 5520 pounds, so that the bales had gained 66.9219 pounds through the absorption of moisture on the ocean voyage.

When the bales arrived the importer duly entered them at the Custom House, computing the duties according to the invoice (Art. 416, Customs Regulations 1899), the Collector took a bond in double the amount of the estimated duties (Art. 639, Customs Regulations 1899) and the bales were sent to bonded warehouse (Art. 641, Customs Regulations 1899).

The Collector then proceeded in due course to ascertain the duty. He did this by multiplying the weight of the thirty-one bales at the time of landing, as returned by the U. S. weigher, by $1.85, under Paragraph 213 of the Tariff Act of July 24, 1897, which reads in part as follows:

> "Wrapper tobacco * * * if unstemmed one dollar and eighty-five cents per pound."

Thereafter the importer withdrew from the bonded warehouse portions of the tobacco as he required them. Sometimes he withdrew a number of pounds from a bale; at other times one or more bales, and some of the bales he exported to Canada.

When the importer withdrew a number of pounds from a bale (see withdrawal entries) the collector multiplied that number of pounds by $1.85, demanded and received the amount so ascertained in cash, and discharged the importers bond *pro tanto*. But when the importer withdrew the remainder of the bale the collector did not compute the duty on the actual number of pounds delivered. Instead of that he subtracted the number of pounds already withdrawn from the bale, from the number of pounds which the U. S. weigher reported the bale to weigh at the time of landing (see withdrawal entries). In this manner the collector demanded and received duty on two to three pounds, which were in fact never delivered.

The importer protested against the action of the collector at the time he was required by the collector to pay in cash more than $1.85 a pound on actual number of pounds of tobacco withdrawn from warehouse and entered for consumption, protests being lodged for safety sake not only within ten days after original liquidation but also within ten days after each withdrawal from bonded warehouse and the collector's denial of the importers' demand for reweighal.

The fact, therefore is, that the collector assessed duty on the combined weight, at the time of the entry in bond, of the tobacco and the moisture absorbed during the ocean transportation and at the time of withdrawal refused to reweigh the merchandise, and liquidated the duties in accordance with the original assessment. Protests were duly filed, claiming that the duty should be assessed on the weight of the goods at the time of withdrawal, under the provisions of Section 20 of

the Customs Administrative Act of June 10, 1890, as amended by Section 54 of the Tariff Act of October 1st, 1890, and by the Act of December 15, 1902 (see Brief, p. 6).

All of the goods were withdrawn from warehouses subsequent to the taking effect of the amendment of December 15th, 1902.

The Board of United States General Appraisers overruled the protests on the ground that Section 33 (Brief, p. 7) of the Tariff Act of July 24, 1897, required the duty to be assessed on the weight at the time of entry.

As none of the goods were imported prior to the taking effect of the Tariff Act of 1897, Section 33 was therefore claimed to have no application, being restricted to merchandise imported prior to July 24th, 1897, as was held by the United States Circuit Court for the Southern District of New York, on appeal by the importers from the decision of the Board of United States General Appraisers. But the Circuit Court sustained the assessment of duty on the ground that the case was governed by Section 2983 U. S. R. S. (Brief, p. 7) the Court holding that the evaporation of the moisture was a "loss" within the provisions of that section.

From the decision of the Circuit Court the importers appealed to the United States Circuit Court of Appeals for the Second Circuit, where the decision of the Board of Appraisers and of the Circuit Court was reversed and the protests sustained, that Court saying:

> "It is clear that evaporation of moisture is not 'loss * * * sustained by * * * merchandise.' "

And the Court held that under Section 20 of the

Customs Administrative Act above quoted the goods should pay only such duties as they would be subject to if imported at the time of withdrawal from bonded warehouse.

The government applied to this Court for a review of the case by writ of certiorari, which application was granted on April 30th, 1906, and the writ issued accordingly.

The point presented is, in its last analysis, whether the importer should pay duty on a quantity of moisture, present in the goods after ocean transportation, but which has disappeared before the importer receives the goods or they enter into consumption in the United States, and while they are in the custody of the government in bonded warehouse.

Following are the various provisions of the law which have to be considered on this appeal:

The preamble to the Tariff Act of July 24, 1897, read in connection with **Paragraph 213:**

> "*Be it enacted by the Senate and House of* "*Representatives of the United States of* "*America in Congress* assembled, that on and "after the passage of this Act, unless other- "wise specially provided for in this Act, there "shall be levied, collected and paid upon all "articles imported from foreign countries, "and mentioned in the schedules herein con- "tained, the rates of duty, which are, by the "schedules and paragraphs, respectively pre- "scribed, namely:
>
> * * * * * *
>
> **"213.** Wrapper, tobacco, * * * if un- "stemmed, one dollar and eighty-five cents "per pound."

Section 20 of the Customs Administrative Act of June 20, 1890, as amended by the Act of December 15, 1902, the amendment being shown by italics:

> "Sec. 20. Any merchandise deposited in "any public or private bonded warehouse "may be withdrawn for consumption, within "three years from the date of original im- "portation, on payment of the duties and "charges to which it may be subject by law "at the time of such withdrawal; *provided*, "*that the same rate of duty shall be collected* "*thereon as may be imposed by law upon like* "*articles of merchandise imported at the time* "*of the withdrawal.* And provided further "that nothing herein shall off-set or impair "existing provisions of law in regard to the "disposal of perishable or explosive articles."

As the section had been amended by **Sec. 54 of the Tariff Act of October 1, 1890,** it reads as follows, the italicized words showing the amendment:

> "Sec. 20. Any merchandise deposited in "bond in any public or private bonded ware- "house may be withdrawn for consumption "within three years from the date of original "importation, *on payment of the duties and* "*charges to which it may be subject by law at* "*the time of such withdrawal; provided*, "That nothing herein shall affect or impair "existing provisions of law in regard to the "disposal of perishable or explosive articles."

Prior to the enactment of 1890 the withdrawal provisions were contained in United States Revised Statutes, **Section 2970,** which read:

> "Any merchandise deposited in bond in any "public or private bonded warehouse may be

"withdrawn for consumption within one year "from the date of original importation on pay- "ment of the *duties* and charges *to which it "may be subject by law at the time of such "withdrawal;* and after the expiration of one "year from the date of original importation, "and until the expiration of three years from "such date, any merchandise in bond may be "withdrawn for consumption on payment of "the duties *assessed on the original entry* and "charges, and an additional duty of ten per "centum of the amount of such duties and "charges."

Section 33 of the Tariff Act of July 24, 1897.

"Section 33. That on and after the day "when this Act shall go into effect all goods, "wares and merchandise *previously imported, "for which no entry has been made,* and all "goods, wares and merchandise *previously en- "tered without payment of duty and under "bond* for warehousing, transportation, or any "other purpose, for which no permit of de- "livery to the importer or his agent has been "issued, shall be subjected to the duties im- "posed by this Act and to no other duty, up- "on the entry or the withdrawal thereof; *pro- "vided:* That when duties are based upon the "weight of merchandise deposited in any pub- "lic or private bonded warehouse, said duties "shall be levied and collected upon the weight "of such merchandise at the time of its "entry."

United States Revised Statutes, Section 2983.

"In no case shall there by any abatement "of the duties or allowance made for any in- "jury, damage, deterioration, loss, or leakage "sustained by any merchandise, while de-

"posited in any public or private bonded ware-
"house."

Section 34 of the Tariff Act of July 24, 1897.

"That * * * all acts and parts of acts
"inconsistent with the provisions of this Act
"are hereby repealed, said repeal to take ef
"fect on and after the passage of this Act.
"* * *"

POINT I.

Duties at the rate of $1.85 per pound are applicable only to the amount of tobacco received, and cannot lawfully be imposed on water which is never entered for consumption and which forms no part of the taxable subject.

The only paragraph under which duty can be imposed on this merchandise is Paragraph 213 of the Tariff Act of 1897, which, so far as pertinent, reads:

"Wrapper tobacco * * * if un-
"stemmed, one dollar and eighty-five cents
"per pound."

In the present case, the extraneous substance, moisture of sea water, forms no part of the tobacco which enters into consumption in the markets of the United States, and which is withdrawn from warehouse; in other words, the water absorbed during transportation is not a part of the commercial article, tobacco, which the importers sell and for which alone they receive payment. Neither do the importers buy and pay for this

moisture, as the consular invoice shows, and hence it at no time constitutes a part of any *commercial* transaction, and yet the Government exacts duty on that water at the rate of $1.85 per pound.

Clearly Congress did not intend to provide in Paragraph 213 for a duty of $1.85 per pound on "water," when it provided for a duty of $1.85 per pound on "wrapper tobacco." We respectfully submit that, even if it had the constitutional power, Congress certainly did not intend to impose an exhorbitant rate of duty on either air or water.

The duty is a specific rate of $1.85 for every pound of wrapper tobacco imported. It does not authorize the imposition of $1.85 on every fourteen ounces of wrapper tobacco received by the importer, nor a duty of $1.85 a pound on the weight of a package containing wrapper tobacco. It is only wrapper tobacco, dutiable per pound, that Paragraph 213 covers.

If this article of commerce, "wrapper tobacco," contained as a constant constituent the water in question, or if that water constituted a part of the commercial article, tobacco, as withdrawn from bond and entered for consumption, this case would be governed by the rule laid down by the United States Supreme Court in

Ernshaw vs. *Cadwalader*, 145 U. S., 247, 259,

where it was held in effect that in determining the dutiable weight of iron ore no deduction should be made on account of moisture, and that it would be improper to ascertain the number of dutiable tons after first expelling the moisture by heating the ore to 212° Farenheit, because "iron

ore," *as known to the commerce of the United States*, was the ore in its natural state in respect to moisture."

But, in the case at bar, the article of commerce, wrapper tobacco, did not contain this quantity of water as an inherent or generally recognized trade portion of the goods. The added weight was only temporary; it was not present before the goods were shipped, nor was it present when they were withdrawn from bond. The water was an extraneous substance which disappeared before the tobacco became incorporated with the general mass of property in the United States. In other words, the water on which duty was here levied, did not constitute a part of the taxable subject or article of commerce, wrapper tobacco, originally, nor did it constitute a part of the wrapper tobacco which went into consumption in the domestic markets.

It is, therefore, respectfully submitted that this case is controlled by

Seeberger vs. *Wright & Lawther Co.*, 157 U. S., 183.

In the Seeberger case it appeared that there was an ascertainable percentage of impurities, consisting of clay, sand and gravel, in an importation of flax-seed, and the question presented was whether the importer was entitled to an allowance for such impurities. It was held that he was, and that in arriving at the dutiable weight of the merchandise, the weight of the extraneous substances, clay, sand, etc., should be deducted from the gross weight found by the collector.

Mr. Justice BROWN, delivering the opinion of the Supreme Court, said:

"We think the Court below was correct in

"assuming that the flax-seed in question, which "is made dutiable by the act of 1885 at 'twenty "cents per bushel of fifty-six pounds,' less the "tare, means 56 pounds of clean seed, or at "least seed freed from any accidental impur- "ities, such as the clay, sand, and gravel in "question. If this seed had been washed or "otherwise cleansed of these impurities, it cer- "tainly will not be contended that they would "be subject to an increased duty, by means of "such cleansing, or that a bushel of 56 pounds "of such seed would be anything more or less "than a statutory bushel. So if, without such "cleansing, the amount of such impurities can "be fixed at a certain percentage, as the find- "ings in this case assume, we see no objection "to the allowance being made, though the seed "be not in fact cleansed."

157 U. S., page 186.

In the case at bar, the weight of the extraneous water or moisture, is just as readily, and even more accurately ascertainable than was the weight of the clay, sand and gravel in the Seeberger case, *for the reason that the importers have sworn weighers' returns showing in each instance the weight of the merchandise when it is withdrawn from bond;* and the difference between those weights and the weights taken by the Government officials at time of entry, will show precisely how many pounds of water have been taxed at the rate of $1.85 per pound.

Hunter vs. *Corning* (C. C. A.), 86 Fed. Rep., 913, holding that the soakage of barrels of distilled spirits is taxable if extracted from the wood *so as to become merchantable*, impliedly holds that such soakage would not be taxable if it were *not* extracted from the wood so as to become an

article of commerce. Much more then should an extraneous substance or natural element, water (which is valueless in a trade sense, and which has totally disappeared), be held to be not taxable, particularly as it has never become or been recognized as an article of commerce. Further, it is to be noted that the soakage from barrels of distilled spirits is the same in material and character as the spirits which were admittedly dutiable, whereas, in the case at bar, the water is not in any way kindred to the taxable subject.

It is a rule firmly established in the imposition of customs duties that it is only on the quantity of goods actually imported and received by the importer that duty should be assessed, because that is all that enters into consumption or into the commerce of the country, or comes into competition with domestic merchandise; and where the quantity shipped from the port of export is greater than that received by the importer, it is only on the latter quantity that he is required to pay duty.

> *Lawder* vs. *Stone*, 187 U. S., 281, and cases reviewed.

And as the importation is not complete until the withdrawal from bond, and merchandise on such withdrawal is to be treated as though then imported, there is no more reason or justice in imposing a duty on a greater amount than the importer receives from the warehouse than there would be in taxing him for more goods than he received on an importation entered for consumption. As was said by the Supreme Court in relation to the quantity actually received on importation:

> "It is * * * the quantity * * * by "which alone the importer is benefited. It is

"all he can sell again to customers. It is all "he can consume. It is all he can re-export for "drawback."

Marriott vs. *Brune*, 9 How., 619, page 633.

A different case and one governed by *Ernshaw vs. Cadwalader, supra*, would be made if after entry and before withdrawal the importer had, and took advantage of, the oportunity to drive off all moisture and produce an abnormal dryness in the tobacco. As a matter of fact, the sponge-like absorbent character of tobacco, and the fact that just before it is weighed at entry, it has been through ocean transportation, gives to the Government, under the practice of the Collector, an advantage quite as considerable and quite as inequitable, as the importer sought to obtain in *Ernshaw's* case; in the one case the importer sought to produce an abnormal and uncommercial dryness and minimum of weight to decrease duties, and in the other the Government seeks to take advantage of an accidental and unavoidable but abnormal and uncommercial amount of moisture and maximum of weight to increase duties.

The bonded warehouses are not unusually dry places. They have the temperature and other climatic conditions that obtain in the places where this tobacco is manufactured and where it is consumed. The decrease in weight that comes to the tobacco while in such warehouses is but the normal elimination of a quantity of water that but for the ocean transportation would not have been present at all—that was not there when the exporter began the exportation and is not there when the importer receives and uses the importation.

POINT II.

Under the provisions of Section 20 of the Customs Administrative Act of June 10th, 1890, as amended, only such duties should be levied on warehouse goods as would be payable on the goods if imported at the time of withdrawal.

This case is governed not only by the principle of law referred to under Point I, but also by Section 20 of the Customs Administrative Act of June 10, 1890, amended December 15, 1902.

Said Section 20 reads as follows, the amendment of 1902 being shown by the italicized words:

> "Any merchandise deposited in any public "or private bonded warehouse may be with- "drawn for consumption within three years "from the date of original importation on pay- "ment of the duties and charges to which it "may be subject by law at the time of such "withdrawal; *provided, that the same rate of "duty shall be collected thereon as may be im- "posed by law upon like articles of merchan- "dise imported at the time of the withdrawal.* "And provided further that nothing herein "shall affect or impair existing provisions of "law in regard to the disposal of perishable or "explosive articles."

The liability of the importer under this section depends upon a determination of what are the duties to which the goods are subject by law at the time of withdrawal from the bonded warehouse. They are not necessarily the duties ascertained at the time of entry, because the amount then as-

certained or estimated is not fixed or unalterable, but is subject to such change as subsequent circumstances may require. It is kept open by protest or the existence of fraud in the liquidation. But even in the absence of protest or fraud, the liquidation of duties at the time of the warehouse entry is in no case a final liquidation and concludes neither the Government nor the importer, for until the goods are delivered to the importer, they are in the custody and control of the Government, subject to any change that Congress may make in the tariff law. As the practice of warehousing goods is regarded by Congress and the Courts, the importation is not complete until such delivery.

As was said by this Court in *Fabbri vs. Murphy*, 95 U. S., 191, pages 197, 198:

> "Throughout those provisions (*i. e.*, the pro-
> "visions regarding the warehousing of imported
> "merchandise) the plain inference is that *Con-*
> "*gress did not regard the importation as com-*
> "*plete*, while the goods remained in the custody
> "of the proper officers of the customs."

The Court is not to assume that any liquidation is a final liquidation. Indeed, the law gives the Collector the power to re-classify any imported merchandise without re-examination at a different rate of duty from that levied on the first liquidation, and to reliquidate the entry accordingly, even where the merchandise has passed from customs' custody.

United States vs. Phelps, 17 Blatchf., 312;
United State vs. Comarota, 2 Fed. Rep., 145;
T. D., 12655, G. A., 1304;
T. D., 23655, G. A., 5118.

Section 21 of the Act of June 22, 1874, which is still in force, provides:

> "That * * * whenever duties upon any "imported goods, wares and merchandise shall "have been liquidated and paid, and such "goods, wares and merchandise *shall have been* "*delivered* to the owner, importer, agent or "consignee * * * such settlement of duties "shall, after the expiration of one year from the "time of entry, in the absence of fraud, *and in* "*the absence of protest* by the owner, importer, "agent or consignee, be final and conclusive "upon all parties."

In the case of *Paris, Allen & Co.*, T. D., 14689, G. A., 2411, it was held (and the rule there adopted has been approved by the Courts), that if the merchandise remained in the custody of the Collector, as for example in bonded warehouse, the one year Statute of Limitation above quoted would not apply, and that so long as the goods remain in the custody of officers of the Government, or constructively in the possession of the United States, the Collector has the power to re-liquidate, even though more than one year from date of entry has elapsed; all of which is referred to simply as tending to emphasize the point that a liquidation is not to be deemed a fixed and absolutely final determination of what duties are chargeable on a given importation. T. D., 8583, is to the effect that where protests have been made, and entries are up for re-liquidation, all errors in original liquidation may be corrected.

Section 10 of the Tariff Act of March 3d, 1883, provided that imported goods in public stores or bonded warehouses when the act went into effect, should, upon entry for consumption, pay the same

duties as though imported after that date. The section was considered by this Court in the case of *Hartranft vs. Oliver*, 125 U. S., 525, and Mr. Justice FIELD, writing the opinion of the Court, said:

> "Goods imported before the act took effect, "if kept in the custody and control of the gov- "ernment, are to be charged with duties ac- "cording to the law in force when they are en- "tered for consumption; that is *when passed "over to the control of the importer or owner.* "The place in which the goods are thus kept is "not the essential fact, but the custody of the "government, and the consequent exclusion of "control over them by the owner, which *calls "for the suspension of previous duties.* There "is manifest justice in the rule that goods thus "withheld from the control of the owner or im- "porter shall be subject only to such duties as "are leviable by the law when he is at liberty to "take possession of them. Ordinarily, goods in "the custody and control of officers of the cus- "toms are placed in a public store or bonded "warehouse, and thus the designation of the "goods as thus placed is, in the legislation of "Congress, in effect a designation, and no more "of their being in such custody. But goods on "board of a ship, in charge of a custom-house "officer, preliminary to their removal to a "public store or a bonded warehouse, and "during the time necessary for that purpose, "are in like custody, and so are within the "spirit and intent of the law, *subject only to "such duties as are leviable* when the goods are "freed from such custody."
>
> 125 U. S., 525, page 528.

In *United States vs. Goodsell Co.*, 84 Fed. Rep., 439, the Circuit Court of Appeals held that where goods were imported on or prior to August 23d,

1894, but remained in the custody of the Government until after August 28th, 1894, when a new tariff act went into effect, they must be treated as though imported after that date.

The case was followed in *Oppenheimer vs. United States*, 90 Fed. Rep., 796.

Mr. Chief Justice MARSHALL, delivering the opinion of the Supreme Court in

> *Brown vs. State of Maryland*, 12 Wheat, 419, 442,

said,

> "The object of importation is sale; it con-
> "stitutes the motive for paying the duties;
> "* * *. The practice of the most commer-
> "cial nations conforms to this idea. Duties ac-
> "cording to that practice are charged on those
> "articles only which are intended for sale or
> "consumption in the country. Thus sea stores,
> "goods imported and re exported in the same
> "vessel, goods landed and carried over land for
> "the purpose of being re-exported from some
> "other port, goods forced in by stress of
> "weather, and landed, but not for sale, are
> "exempted from the payment of duties."

In the case of The Brig Concord, 9 Cranch., 387, the Supreme Court (opinion of Mr. Justice STORY) held that goods on board a neutral vessel, which was captured by a United States armed vessel and brought into the port of New York, in other words, "goods brought by superior force or by inevitable necessity, into the United States," are not to be deemed imported so as to attach the right to duties until they are "sold or consumed in the country or incorporated into the general mass of its property."

It is settled law also that in the case of property

salved on the high seas and brought into the United States, the Government's right to duties does not accrue *until*, by virtue of a sale, they *"pass into consumption,"* within the United States.

Merritt vs. One Package of Mdse., 30 Fed. Rep. 195; affirmed in 32 Fed. Rep., 111.

In *United States vs. Benson*, Fed Cas., 14577, the United States Circuit Court, for the District of Massachusetts, said:

> "The better opinion is that the importation "of foreign goods is not complete, as between "the importer and the government, as long as "the goods remain in the custody of the officers "of the customs, and that until they are de- "livered to the importer, whether on shipboard "or in warehouse, they are subject to any duties "or imposts which Congress may see fit to im- "pose. The practice of the government shows "that goods in warehouse or on shipboard have "always been regarded as subject to new legis- "lation, both in respect to duties and in respect "to alteration in the warehouse laws."

In *DePass vs. Bidwell*, 124 Fed. Rep., 615, where it was held that goods imported from Porto Rico prior to the passage of the Foraker Act and placed in bonded warehouse, were dutiable under that act when withdrawn subsequent to its passage, RAY, J., delivering the opinion of the Circuit Court, said:

> "Section 20 of the Customs Administrative "Act of June 10, 1890, * * * provides "that any merchandise deposited in any public "or private bonded warehouse, may be with- "drawn for consumption within three (3) "years from the date of original importation "on payment of the duties and charges to which "it may be subject, by law, at the time of such

"withdrawal.' At the time the sugars in ques-
"tion were entered and put in *bond by the*
"owner, they were not subject to duty, as the
"Foraker Act was not a law, and the Dingley
"Tariff Law had ceased to be operative. The
"importer, however, did not see fit to enter
"these goods for consumption at that time, and
"place them upon the market, but, so far as ap-
"pears, voluntarily placed them in government
"custody by making a warehouse entry and al-
"lowing them to remain. While it is true that
"this sugar was imported on or about June 24,
"1899, such importation was not complete and
"did not become a closed transaction so long as
"the goods remained in the custody of the of-
"ficers of the customs. Until withdrawn from
"bond and delivered to the importer, whether
"on shipboard or in warehouse, they were sub-
"ject to any duties which Congress saw fit to
"impose. While in this condition, the goods
"were being imported, and became subject to
"such new legislation in respect to duties and
"in respect to warehouse laws as Congress saw
"fit to enact. The goods were in the possession
"of the Government, left there voluntarily, and
"properly were the subject of new legislation.
"For duty purposes, not having been delivered
"to the importer until after the passage of the
"Foraker Act, *they are to be regarded and*
"treated the same as though they had actually
"arrived at the port of New York after the en-
"actment of that law."

124 Fed. Rep., 615, page 620.

Counsel for the Government may claim that a debt arose (the Government acquiring the right to collect, and the importer being obligated to pay duty) as soon as the goods arrived in the United States; but in answer to such claim, if it be made, it is respectfully submitted that the debt thus aris-

ing was not an absolute but a conditional one, *because the importer had an undoubted right to* place the goods in bonded warehouse, or under general order, and thereafter to export the whole or a portion of them; and on the quantity so exported he either would not be required to pay, or would be entitled to a refund of the duties paid less one per cent. The amount of his refund would be determined by the weight of the goods at the time of exportation (Customs Regulations of 1899, Art. 1121). To adjust the duties with any fairness in such a case, the amount at the time of exportation should agree with the amount which would be collected from the importer if he then received the goods for sale or consumption.

Furthermore, that a fixed and final debt of the importer to the Government did not rise when the goods arrived is clearly shown by the authorities above quoted, including *Hartranft vs. Oliver*, 125 U. S., 525, 528. If the obligations and rights of both importer and Government became fixed and settled in the first instance, clearly the Government would be under an obligation (irrespective of any subsequent change in law) to deliver the goods out of bonded warehouse to the importer whenever the latter duly tendered the amount of duty as determined by the customs officials, at time of importation. But such is not the case here. Let us assume that on the arrival of certain tobacco in the United States and before it was put in warehouse, $5,000, was estimated and fixed by the Collector as the duty to be paid thereon. Subsequently and while the goods are still in bonded warehouse, Congress enacts a law that the immediate coverings on bales of tobacco shall be dutiable (see for example Paragraph 212,

Tariff Act of July 24, 1897), under which the duty on this tobacco would amount to $7,500. After such enactment the importer tenders the $5,000, duty originally fixed, and demands that the merchandise be delivered to him. The Collector declines, and rightly, holding that the Government is entitled to an additional $2,500 in duties or security therefor, prior to delivery. Hence we submit, the debt, which arises on the importation of merchandise that is placed in bonded warehouse is no wise fixed or absolute, but is conditional and cannot become final until such time as the goods are withdrawn for consumption.

Former Section 2979, U. S. R. S., provided that warehoused merchandise might be withdrawn within a year from the date of importation "on payment of the duties and charges to which it may be *subject by law at the time of such withdrawal*"; and after three years from such date might be withdrawn "on payment of the duties *assessed on the original entry* and charges." So that Congress *could not have regarded the duties payable on withdrawal as those liquidated on entry.*

In *Oppenheimer vs. United States*, 90 Fed. Rep., 796, following the case of *United States vs. Goodsell Co.* (C. A. A.), 84 Fed. Rep., 439, it was held that where goods were entered on August 27, 1894, but remained in the actual custody of the United States Government until the 28th, they "*must be treated* as imported on August 28, 1894," and were dutiable under the Tariff Act of 1894, rather than under the Tariff Act of 1890.

Until the time of withdrawal from bond it cannot be finally determined what duties will then be payable on the goods, for the amount must be ascertained under the statutes at that time in

force. When, therefore, the statute provides that the duties payable on withdrawal of goods from bond shall be the duties to which they may then be subject, it clearly requires that the duties shall be such as would be imposed on the goods if imported at the time of withdrawal.

In *Mosle vs. Bidwell*, 130 Fed. Rep., 334, where the merchandise in suit was imported and placed in bond prior to the Ratification of Treaty between the United States and Spain, but wtihdrawn from bond after the ratification and before the passage of the Foraker Act, the Circuit Court of Appeals, in the Second Circuit, construed this section to mean that the duties to be paid on withdrawal from bond were such as should be paid if the goods were imported at the time of withdrawal.

The amendment of 1902 was merely declaratory. It neither added to nor detracted from the scope of the original section. It merely made certain what was already the law, that where goods were held in warehouse until there had been a change in the rate of duty, the rate in force at the time of withdrawal should be applied. In that, as in all other respects, merchandise withdrawn from bonded warehouse is to be treated as though then imported. That is the time when the importation is complete. And *if, until that time, the Government has the same rights in the imposition of duties that it has in relation to merchandise thereafter to be imported, it is but according to the importer a commensurate right that his obligation for duties should be no greater than if the importation were made at that time. It can in no event be less.* If the bond of the importer were to be treated as an absolute contract to pay the duties as ascertained on entry, it would involve, as an equivalent, an agreement on the part of the

Government to deliver up the goods on the payment of that amount. But under the authorities cited, that has never been the construction placed upon the transaction. The undertaking on the part both of the importer and the Government, is subject to all subsequent contingencies effecting a change in the duties payable.

Our learned opponent seems to take the position that a rate of duty is something entirely separate from and independent of the weight of the merchandise. It is submitted that this position is erroneous. The "duties," which Paragraph 213 of the Tariff Act, and Section 20 of the Customs Administrative Act provide, shall be paid when goods are withdrawn from warehouse, could be ascertained in this case only by multiplying the weight or number of pounds of merchandise by $1.85. The rate of duty which Congress provided should be paid on imported wrapper tobacco, according to the preamble and Paragraph 213 of the Tariff Act of 1897 is "one dollar and eighty-five cents *per pound*." It is perfectly clear from this provision that the *weight* is one of the elements of rate. If the rate of duty on tobacco were, say, $1.00 per pound, it could not logically be said that although $500 duty was exacted on 250 pounds of tobacco, nevertheless that tobacco paid the same rate of duty as 500 pounds of tobacco on which the same amount of duty, $500, was charged. We submit that the result of exacting $500 duty on 250 pounds of tobacco would be to make that 250 pounds pay duty *at the rate of $2 per pound*, whereas the 500 pounds of tobacco would pay duty at the rate of $1.00 per pound.

On precisely the same reasoning in the case at bar, it could not be said that when the Collector exacted $995.30 duty on 530 pounds of tobacco withdrawn

from warehouse, and entered for consumption, he was exacting duty at the rate of $1.85 per pound (see withdrawal entries covering Bales 2243, 2244 and 2263, and the sworn weigher's returns of their actual weight on withdrawal). On the contrary, he was exacting duty contrary to the express provisions of Section 20 and Paragraph 213, at the rate of $1.875 per pound. And we respectfully submit such exaction was not warranted by law.

It is inconceivable that in passing Section 20 of the Customs Administrative Act, and using the words "duties and charges to which it (the merchandise) may be subject by law *at the time of such withdrawal*," Congress could have meant the duties and charges to which it was subject by law *at the time of importation*." If it had so intended, it seems reasonable to assume that it would have used language somewhat as follows:

> "Merchandise deposited in warehouse may be "withdrawn for consumption within three "years on payment of the duties which accrued "at time of entry."

But such was not the legislative intent. Congress intended according to the plain import of the words used, to provide that warehoused merchandise might be withdrawn on payment of the same duty to which it would have been subject if originally imported at the time of its withdrawal from bond.

If Section 20 were construed to mean that warehoused goods might be withdrawn on payment of the duties which accrued at the time of original importation, the section would seem to be superfluous, because no one would suppose for a moment that an importer, by leaving goods in bond, instead of taking them at once and paying the duty, could escape the payment of duty entirely.

POINT III.

The proviso appended to Section 33 of the Tariff Act of July 24th, 1897, applies only to merchandise imported before the date when that Act took effect.

As none of the importations in the case at bar were made prior to July 24th, 1897, Section 33 has no application in this case.

In the Court below the soundness of this proposition and of the decision of the Circuit Court upholding it was conceded. The learned Attorney-General, however, contends that the proviso is of general application, and has presented the point as having considerable importance, but the unsoundness of the Government's position is patent upon an examination, not only of the language of the section, but of the rules governing its construction.

Section 33 reads:

> "That on and after the day when this act "shall go into effect, all goods, wares and "merchandise previously imported, for which "no entry has been made, and all goods, wares "and merchandise previously entered without "payment of duty and under bond for ware-"housing, transportation or any other purpose, "for which no permit of delivery to the im-"porter or his agent has been issued, shall be "subjected to the duties imposed by this Act, "and to no other duty upon the entry of the "withdrawal thereof: Provided, That when "duties are based upon the weight of merchan-"dise deposited in any public or private bonded "warehouse, said duties shall be levied and col-

"lected upon the weight of such merchandise "at the time of its entry."

Reduced to its simplest terms, the section, so far as it refers to bonded warehoused merchandise, would read:

"That goods heretofore entered, without pay- "ment of duty, and under bond for warehouse, "shall be subject to the duties imposed by this "act, upon the withdrawal thereof. Provided, "that when duties are based upon the weight "of such merchandise, they shall be levied and "collected upon the weight of such merchandise "at the time of its entry."

That is the whole scope and meaning of the section, construed in accordance with the rule that a proviso refers only to the provision of a statute to which it is appended. That rule has become so firmly established, in stautory construction, that it would hardly seem now to be open to argument.

Minis vs. United States, 15 Peters, 423;
United States vs. Dickson, *id.*, 141;
United States vs. Slazenger, 113 Fed. Rep., 525;
Endlich on Inter. of Stat., Sec. 186.

This Court has stated the rule in Minis vs. United States, at pages 445-6 of 15 Peters, as follows:

"The office of a proviso, generally is either to "except something from the enacting clause, or "to qualify or restrain its generality, or to ex- "clude some possible ground of misinterpreta- "tion of it, as extending to cases not intended "by the Legislature to be brought within its "purview. A general rule, applicable to all "future cases, would most naturally be ex-

"pected to find its proper place in some distinct "and independent enactment."

And in United States vs. Dickson, at page 165, of 15 Peters:

"* * * we are led to the general rule of "law which has always prevailed, and become "consecrated almost as a maxim in the inter- "pretation of statutes, that where the enact- "ing clause is general in its language and ob- "jects, and a proviso is afterwards introduced, "that proviso is construed strictly and takes no "case out of the enacting clause which does not "fall within its terms. In short, a proviso "carves special exceptions only out of the en- "acting clause, * * *."

The general understanding of the rule is stated in Endlich on Interpretation of Statutes, Section 186:

"From a consideration of the office and func- "tion of a proviso, it would seem to follow that "it can have no existence, separate and apart "from the provision which it is designed to "limit. * * * Moreover, a proviso is al- "ways to be construed with reference to the im- "mediately preceding parts of a clause to "which it is attached, and limits only the pas- "sage to which it is appended, and not the "whole section or act, at least only the section "with which it is incorporated."

In the section under consideration, the enacting clause imposed the duties prescribed by that Act upon all goods *previously* imported, and which had either not been entered, or had been entered without payment of duty, and under bond for warehouse, or any other purpose, and as to such goods under bond, and in warehouse, the duties were by

the proviso, made payable on the weight at the time of entry.

The duties by the enacting portion of the section imposed on goods previously imported and then in bonded warehouse were such as would be payable on the same goods imported at the time of withdrawal under Section 20 of the Customs Administrative Act, as amended by the Act of October 1st, 1890. So that the special proviso was necessary if previously imported goods were to be dutiable on their weight at the time of entry. Not without ignoring the plain language of the section and the highest judicial precedent, can the proviso be read and construed apart from the preceding portion of the section. As the section was enacted it furnishes no ground for the contention that merchandise generally, or merchandise subsequently imported should be assesed for duty upon its weight at the time of entry.

The decision in *United States vs. Whitridge*, 197 U. S., 135, is not an authority that the proviso contained in the paragraph under consideration herein may be construed independently of the single clause it certainly modifies. The proviso (if it can be technically termed so) in the *Whitridge* case was, in fact, added to the body of a section passed twenty-four years after the original enactment thereof, and to accomplish a separate and distinct purpose. It certainly did cover more than the main clause in that section, and was clearly broader than the section itself, whereas, the proviso in this case can and should be limited to the particular section to which it is attached.

There are no reasons here, as there were there, for not limiting the proviso to the subject-matter of the clause qualified by it, in accordance with the gen-

eral rule, assuming, but not conceding, that it could be extended. The learned Court, moreover, in the case of *Whitridge*, in so many words confined its decision to the particular case before it, being careful to say at the close of its opinion (p. 146) "We confine our decision to the particular case"; and expressly stated and approved the general rule that (p. 143), "the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause." The case surely does not hold that a clause which is in form a proviso and can consistently be limited to the paragraph may ever be construed as a wholly independent section—the bold proposition now advanced by the Government. We confidently believe that when this Court re-examines the opinion in the Whitridge case it will again conclude that the decision there rendered is applicable only to its facts and that it cannot properly be cited as an authority in this case, for the position taken by the Government. This Court has said, in the case of *Arthur vs. Morrison* (96 U. S., 108), that a well known rule of construction remains in force until abolished by Congress.

It is of course the intent of the statute that must prevail, but that intent must be gathered from the language used. In the case of Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1, at pages 36-37, Mr. Justice HARLAN, writing the opinion of this Court, said:

> "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden vs. Collector*, 5 Wall., 107,

111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' "

The meaning of the statute may not be looked for in the opinions of *individual* legislators.

In re Schilling, 53 Fed. Rep., 81, the Circuit Court of Appeals had under consideration a statute where, as appears in the opinion, it was [illegible]ted by members of each branch of the comm[illegible] conference, that the clerks of the two comm[illegible] in preparing the report made a mistake by e[illegible]ing the parenthesis in the wrong place."

The Court said:

"Apart from the declarations of the members "of the conference committees upon the floor "of congress, it could hardly be claimed that "the intent of the statute plainly required a "change in the punctuation. An inference "could be drawn from the history of the statute "before it reached the committees of confer- "ence, but, in view of the manifest limitation "by the parenthesis, such an inference would "not be controlling. Are, then, the declarations "of the members of the committees sufficient to "authorize a court to change the manifest "meaning of a statute as it passed the legis- "lative body and received the approval of the "president, and to construe it in accordance "with the intention of the committees? I think "that such a judicial construction of a statute "is akin to judicial legislation, which, as con- "gress has refused to act upon the subject, it is "well to avoid."

In re Downing, 56 Fed. Rep., 470, at page 474:

> "When the language of a statute is plain and "unequivocal it is not permissible to search for "another meaning, which may have existed in "the minds of individual legislators, and find- "ing that meaning, to substitute it for the "meaning expressed."

It was sought in that case to show the meaning of the statute by statements in a report of a senate committee.

In American Net & Wire Company vs. Worthington, 141 U. S., 468, the Supreme Court said that

> "the statements made and the opinions ad- "vanced by the promoters of the act in the "legislative body are inadmissible as bearing "upon its construction, although reference to "the proceedings of such body may properly be "made to inform the court of the exigencies of "the fishing interest and the reasons for fixing "the duty at this amount."

United States vs. Union Pacific R. R. Co., 91 U. S., 72, at page 79, this Court said:

> "In construing an act of Congress, we are "not at liberty to recur to the views of individ- "ual members in debate, nor to consider the "motives which influenced them to vote for or "against its passage. The act itself speaks the "will of Congress, and this is to be ascertained "from the language used."

So in this case, the statute itself, construed in accordance with settled rules, must be presumed to speak the will of Congress, and the construction limiting the proviso to the previous portion of the paragraph, is that required by the language and form of the statute which Congress has adopted.

POINT IV.

Even if the proviso of Section 33 were of general application it does not warrant the imposition of duty on sea water.

By its terms the proviso applies only to duties to be levied and collected upon the "weight of *merchandise*," and the moisture absorbed during the sea voyage, and which evaporates in the warehouse is not merchandise even when combined with a taxable article. The merchandise of the importation, that is, the tobacco, weighed the same at the time of entry as at the time of withdrawal.

Thus formerly, in an importation of flax-seed, if each bushel of 56 pounds contained two pounds of impurities, the duty by the Tariff Act imposed upon flax-seed would be assessed on only 54 pounds in each bushel, as was decided in the case of Seeberger vs. Wright, *supra*. Similarly, in an importation of tobacco, if in each bale weighing 180 pounds on entry, the weight of the tobacco is only 178 pounds, the duty is required to be levied only on the 178 pounds of tobacco, that being the only merchandise contained in the bale. The additional two pounds of accidental and temporary moisture is not merchandise.

Such a construction is in accordance with principles of natural justice and equity, and the rule of general application in the construction of revenue laws, that an importer shall be required to pay duty only on the merchandise actually imported by him, *and which enters into consumption* in the United States. The liability of the importer is to be determined in the light of the whole scope and purpose

of the revenue laws. However extensive the taxing power of Congress may be, whether for the purpose of raising revenue or protecting American manufactures, it may safely be assumed that it is the intention of Congress to impose duties only on imported *merchandise;* that no legislative body ever had in mind taxing sea water that never entered into consumption, or any other substance without commercial value, even when accidentally combined with merchandise at the time of landing. Such a tax surely could not be a legitimate source of revenue, and could serve no protective purpose. It would be utterly foreign to every theory of taxation. In applying the revenue laws the Courts have adopted the equitable rule that burdens shall not be imposed on a taxpayer beyond what is expressly required by statute and when the result would be to subject an importer to a duty on something he never receives, and which is utterly worthless, the statute should not be given an application beyond what its language imperatively requires.

POINT V.

There was no "loss" of the imported merchandise with the provisions of Section 2983 U. S. R. S.

It is respectfully submitted that Section 2983 of the U. S. Revised Statutes is not applicable to the present case. That section reads:

> "In no case shall there by any abatement of "the duties or allowance made for any injury, "damage, deterioration, loss or leakage sus- "tained by any merchandise, while deposited in "any public or private bonded ware house."

If, as contended by the importer, and may be held to be established by the authorities referred to in Point II of this brief, merchandise on withdrawal from warehouse is to be treated the same as though then imported and duty assessed accordingly under Section 20 of the Act of June 10, 1890, as amended December 15, 1902, Section 2983 can only be applied to merchandise that does not come within the provisions of Section 20, such as the merchandise covered by Section 33 of the Tariff Act of 1897, referred to in the Third point, and cannot apply where it would be in conflict with Section 20, a later enactment.

Whether or not Section 2983 and Section 20 would in any event be conflicting, it is not material here to consider, for Section 2983 could be applied to no case not therein provided for and it does not, either by its terms, or any reasonable implication, cover a reduction in weight such as has occurred here.

The words "loss" and "damage" as employed in Section 2983, seem to have the ordinary meaning that would be attributed to them if they were used in any fire insurance policy, or in common speech. In the case at bar, there has been no loss of any goods. None of the taxable subject has disappeared. The importer received from the warehouse all the merchandise he entered. It is only the moisture contained in the goods that is absent, and that is no loss of the tobacco. Every other term in the provision refers to some actual loss of value or amount of goods. But here none of the tobacco was either lost or injured or damaged, or deteriorated. Every pound of tobacco that was entered is present and uninjured.

To obtain a correct idea of the scope, purpose

and meaning of Section 2983, it should be considered in connection with Section 2984 of the U. S. Revised Statutes. Said Section 2984, so far as pertinent, reads as follows:

> "Sec. 2984. *Abatement and refund in case "of injury by casualties.* The Secretary of the "Treasury is hereby authorized, upon produc- "tion of satisfactory proof to him of the actual "injury or destruction in whole or in part, of "any merchandise, by accidental fire, or other "casualty while the same remained in the "custody of the officers of the customs in any "public or private warehouse under bond "* * * to abate or refund, as the case may "be, out of any moneys in the Treasury not "otherwise appropriated, the amount of import "duties paid or accruing thereupon; and like- "wise to cancel any warehouse bond or bonds, "or enter satisfaction thereon in whole or in "part as the case may be."

Sections 2983 and 2984 originally formed part of the same Act of Congress, to wit, the Act of March 28, 1854, entitled, "An Act to extend the warehousing system by establishing private bonded warehouses, and for other purposes." Section 2983 is extracted from Section 4, and Section 2984 is extracted from Section 8 of the Act of March 28, 1854.

The apparent hardship which Section 2983 imposed upon importers is greatly lessened, and its scope and effect limited by the terms of Section 2984. In effect, Section 2984 provides that there may be an abatement or refund of duties on warehoused goods by the Secretary of the Treasury in case they are injured or partially or wholly destroyed by accident. Thus, on merchandise in warehouse that sustained damage, or partial or

total loss through explosion, flood, lightning, accidental fire or other casualty, duty allowance or rebate might be made.

It clearly appears that what is now Section 2983 of the Revised Statutes, was designed to prohibit any reduction or abatement of duties for any loss of damage or injury to warehouse goods, due to some cause *other* than "accidental fire or other casualty." Both Sections 2983 and 2984 clearly refer to an actual loss or reduction in the amount of the goods. As was said by Judge TOWNSEND, writing the opinion of the Circuit Court of Appeals:

> "* * * by these two sections the im-
> "porter is protected in case of loss of ware-
> "house merchandise by casualty; the govern-
> "ment is protected in case of loss of merchan-
> "dise from any other cause. It is clear that
> "evaporation of moisture is not 'loss * * *
> "sustained by * * * merchandise.'"

While every statute must be construed with a view to the intention of the Legislature in passing it, that intention must be gathered from the language used (United States vs. Freight Association, 166 U. S., 290, 318, and cases cited). There is nothing here to indicate that by the provisions of this section, Congress intended anything beyond the scope and meaning of the words in which it is expressed. In prohibiting any allowance for "loss" of goods, it is but a reasonable presumption that the prohibition was directed against an allowance on goods lost in bonded warehouse, whether by leakage or otherwise. It cannot be regarded as a loss of goods that a foreign substance has been eliminated from them by whatever process the elimination may have occurred. It

may be conceded that loss would cover evaporation of wine or the "melting" of sugar, for the quantity of the article itself would be reduced thereby. But the disappearance of the accidental moisture in the present case is no more a loss of the tobacco than it would have been a loss of the flax-seed in Seeberger's case, *supra*, if the seed had been stored in warehouse in meal bags and, in the course of handling, the dust had sifted out.

POINT VI.

It is submitted that by the plain terms of the statutes governing the case, the importers were required to pay duty only on the amount of tobacco they received from the bonded warehouse, but if there could be deemed to be any doubt as to the meaning or intent of any of the statutes, the construction should be in favor of the importers.

A rule so firmly established in the construction of revenue laws it is doubtless unnecessary to call to the attention of this Court, even by a brief reference. Writing the opinion of this Court in Eidman vs. Martinez, 184 U. S., 578, Mr. Justice BROWN said, at page 583:

> "We have ourselves had repeated occasion to "hold that the customs revenue laws should be "liberally interpreted in favor of the importer, "and that the intent of Congress to impose or "increase a tax upon imports should be ex- "pressed in clear and unambiguous language.

"Hartranft vs. Weigmann, 121 U. S., 609;
"American Net & Twine Co. vs. Worthington,
"141 U. S., 468; United States vs. Wiggles-
"worth, 2 Story, 369; Powers vs. Barney, 5
"Blatchford, 202."

The respondents contend that the language of Section 20, the law governing this case, authorizing the withdrawal of warehoused goods on payment of the duties to which they are subject at the time of withdrawal, *clearly* entitles them to the relief that they ask, and that neither Section 33 of the Tariff Act of 1897, nor Section 2983 of the Revised Statutes had any application; but if it be found either that the question is not free from doubt, or that the lawmakers failed to express *in clear and unambiguous language* their intent, if intent it was, to charge high duty on water as well as tobacco, and to exact payment of duties based on the weight of the merchandise at time of its entry, as distinguished from time of withdrawal from bond, then, also, the respondents are entitled to the relief that they ask.

POINT VII.

The decision of the United States Circuit Court of Appeals should be affirmed and the cause remanded with instructions to the United States Circuit Court to enter judgment accordingly.

Dated New York, Nov. 28, 1906.

Respectfully submitted,

HATCH, KEENER & CLUTE,
Attorneys for Respondents.

JOHN G. CARLISLE,
EDWARD S. HATCH,
J. STUART TOMPKINS,
Of Counsel.

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OCT 15 1906
JAMES H. MCKENNEY, Clerk.

No. 259.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, PETITIONER,

v.

G. FALK AND BROTHER.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, PETITIONER,
v.
G. FALK AND BROTHER. } No. 259.

MOTION TO ADVANCE.

Comes now the Solicitor-General on behalf of the United States in the above-entitled cause and moves the court to advance the same on the docket and set it down for hearing on a day convenient to the court during the present term. The case is a customs case, in which the court, on April 30 last, granted the petition of the United States for a writ of certiorari.

The question to be determined is whether tobacco withdrawn from warehouse is dutiable on the basis of its weight at the time of entry or at the time of withdrawal. There are now on the suspended files of the Board of General Appraisers at New York, held pending the decision of this cause, more than 15,000 protests, and they are accumulating at a rate of nearly 2,000 per month.

Under the decision of the Circuit Court of Appeals it is estimated that the Government

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would lose in duties possibly more than $1,000,000 annually on tobacco alone, while the principle involved will apply to other articles, especially wool, sugar, skins, hides, etc., containing much moisture, upon which the duty would materially decrease. For these reasons, and because of the conflicting views of the tribunals below, it is submitted that the case should be advanced for early hearing.

Opposing counsel concur in this motion.

HENRY M. HOYT,
Solicitor-General.

O

Supreme Court of the United States.

No. 259.—October Term, 1906.

The United States, Petitioner, vs. G. Falk & Brother. } On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 7, 1907.]

Mr. Justice McKenna delivered the opinion of the Court.

This case involves the question whether, upon withdrawal of imports from a bonded warehouse, duties should be collected according to their weight then or upon their greater weight when entered and imported into the country, the loss having been occasioned by evaporation of moisture.

The merchandise in question was leaf tobacco imported into the port of New York, a part before and a part after July 24, 1897. It was entered under bond for warehousing without the payment of duty and withdrawn from warehouse after the present tariff act went into effect, and was assessed by the collector for duty on the basis of weight at the time of its entry. The importers, Falk & Brother, protested and appealed from the decision of the collector to the board of general appraisers. The board affirmed the ruling of the collector on its opinion in *In re Schmidt*, (G. A. 4214, T. D. 19715.) Falk & Brother then instituted proceedings for review before the Circuit Court for the Southern District of New York, and that court sustained the decision of the board of appraisers. (145 Fed. Rep. 574.) The Circuit Court of Appeals reversed the Circuit Court. (145 Fed. Rep. 484.)

The contention of the importers is that the merchandise is subject to duty under the provisions of Schedule F of the act of July 24, 1897, based upon weight at the time of *withdrawal* from bond for consumption, under the provisions of section 50 of the act of October 1, 1890. It is contended that the proviso of the latter act has not been repealed but is in full force and effect, and is applicable to merchandise entered in bond subsequent to the passage of the act of July 24, 1897. The board of appraisers held that the proviso of section 50 of the act of 1890 was repealed by section 33 of the act of 1897.

Those sections are, respectively, as follows:

"Sec. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation,

or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported, respectively, after that day: *Provided*, That any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: *Provided further*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its *withdrawal*." (26 Stat. 524.)

"SEC. 33. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof: *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its *entry*." (30 Stat. 213.)

The Circuit Court held that those sections were not repugnant. The court said: "Neither is general in its application, but is restricted to merchandise previously imported for which no entry has been made." The court, however, sustained the decision of the board on the ground that section 2983 of the Revised Statutes was applicable. That section is as follows: "In no case shall there be any abatement of the duties or allowance for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse."

The importers denied the application of that section, and contended that under the law, and particularly under section 20 of the Customs Administrative Act of June 10, as amended December 15, 1902, (presently to be stated,) they were authorized to withdraw the merchandise from warehouse upon the payment of duties and charges based upon its weight at the time of withdrawal. The court ruled against the contention, and said: "It seems too plain for discussion that the word 'loss' (referring to section 2983), coupled as it is in the disjunctive with 'leakage,' applies precisely to such a case as the one before us. I can not find any sound reason for believing that the Congress did not have section 2983 in mind when it enacted said section 20, as amended. It is obvious that section 20, especially as amended, refers exclusively to rate rather than weight." The Circuit Court of Appeals differed from the Circuit Court in the application of section 2983. It held that the loss there provided for related solely to the

loss of merchandise subject to duty, and such loss had not occurred. The court further held that the other terms of the section referred to actual reduction in the value or quantity of the merchandise itself. "It is clear," it was said, "that evaporation of moisture is not 'loss' . . . sustained by . . . merchandise." The case of *Seeberger* v. *Wright & Lawther Co.*, (157 U. S. 183,) was referred to as analogous. The court also disagreed with the construction of the Circuit Court of section 20 of the Customs Administrative Act, and held that by virtue of the proviso added to that section December 15, 1902, (stated later,) duties should have been assessed according to the weight of the tobacco at the time of its withdrawal.

This history of the case exhibits the contentions of the parties and the elements of the contentions, and, it will be seen, the case is one of statutory construction.

First, as to *Seeberger* v. *Wright & Lawther Co.*, (157 U. S. 183,) which is urged as controlling. The importation there was flaxseed. The proof showed that the seed contained dust composed of clay, sand and gravel to an average of four per cent. The case turned upon the meaning of the word "draught" in section 2898 of the Revised Statutes. It was assumed that the word did not apply to impurities, and, it was said that the lower court was correct in assuming that the flaxseed in question which was made dutiable, under the act of 1883, at twenty cents per bushel of fifty-six pounds, less tare, meant fifty-six pounds of clean seed, or at least seed free from any impurities, such as the clay, sand and gravel in question.

The moisture which the tobacco in the case at bar absorbed can not be said to be an impurity within the meaning of that decision even though moisture in tobacco is a variable quantity and its amount can be estimated by weighing the tobacco at different times. Nor can it be considered as an independent, non-taxable substance, even though, as conceded in this case, it was absorbed on the ocean voyage. The statutes contemplate and apply to merchandise which may change in weight, and if the moisture in the tobacco in this case can be regarded as an independent substance—so much "sea water," to use counsel's graphic phrase—a question of the application of section 50 or 33 could not arise. One or other of those sections was considered applicable from the beginning, and the importations regarded as controlled by it, as merchandise subject to duty by weight, and necessarily there was involved the question at what time the weight should be estimated—at the time of entry or at the time of withdrawal from warehouse. To that question, then, we shall address ourselves.

It is said by counsel for the United States that, prior to October 1, 1890, duties were uniformly demanded and collected according to the weight of merchandise at original entry, citing in support of the assertion the custom regulations of 1884 and 1899. Upon that date (October 1, 1890) the tariff act of 1890 took effect. Section 50 provided, as we have seen, that goods pre-

viously imported, for which no entry had been made, and goods warehoused, for which no permit of delivery had been issued, should be subject to no other duty than if the goods were imported after the day the act took effect. It was also provided that when duties were based upon the weight of warehoused merchandise the duty should "be levied and collected upon the weight of such merchandise at the time of its *withdrawal*" (italics ours). A question arose as to the scope of the proviso, whether it was restricted to the matter immediately preceding, that is, merchandise imported before the act took effect, or was of general application, applying as well to merchandise imported after as before the act took effect. The Attorney General decided that the latter was its effect. He said, (20 O. A. G. 81, 82): "I am aware that under former tariff acts the rule has been to levy duties upon weighable merchandise according to the weight at the date of importation, but this proviso seems to be intended to change that rule, and there seems to be sufficient reason for such change."

The executive officers of the Government followed this construction until the act of July 24, 1897, known as the Dingley act, was passed. The construction made by the Attorney General is disputed, as applicable to section 33 of the act of 1897, and it is urged that the whole scope and meaning of that section, when reduced to its simplest terms, make goods theretofore entered under bond for warehouse subject to the duties imposed by the act upon the withdrawal thereof, when the section is construed in accordance with the rule that a proviso refers only to the provision of a statute to which it is appended. This may be conceded to be the primary purpose of a proviso, but a presumption of such purpose can not prevail to determine the intention of the legislature against other tests of meaning more demonstrative. We said in *United States* v. *Woodbridge* (197 U. S., at page 143): "While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of the principal clause, we can not forget that in practice no such limit is observed." And the Attorney General's opinion can not be overlooked. The proviso which he construed in section 50 of the act of 1890 was re-enacted in section 33 of the act of 1897. It would be extreme to hold that Congress by doing so intended to set up the technical rule relating to provisos against the construction of the Attorney General and to change that construction by repeating the very words construed. And there could have been no oversight. The practice of the executive officers for years gave emphasis and materiality to the construction. A change was made, however—a change of one word—a change recommended by the Treasury Department to increase the revenues and give greater convenience to the administration of the customs laws. The word "entry" was substituted for the word "withdrawal," and necessarily thereafter duties upon merchandise there provided for were to be

based upon weight at the time of *entry*. Nor do we see that there is any contradiction of this in other provisions of the statute. Certain provisions of the Customs Administrative Act are, however, relied upon. The provisions of that act, hereafter quoted, originated in section 1 of the act of March 14, 1866, (14 Stat. 8,) and were carried into the Revised Statutes as section 2970, which provided that merchandise deposited in warehouse might be withdrawn for consumption within one year from the date of importation, upon payment of the duties and charges to which it might be subject by law at the time of withdrawal. At the expiration of one year, and until the expiration of three years, it might be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum on the amount of such duties. It was decided in *Merritt* v. *Cameron*, (137 U. S. 542, 550, 551,) that that section "was intended to provide for cases in which a change of rate of duty had been made by statute while the merchandise was in bonded warehouse."

Then came section 20 of the Customs Administrative Act of June 10, 1890, (26 Stat. 140, 624,) as amended by act of October 1, 1890, providing that warehouse merchandise might be withdrawn for consumption within three years from the date of the original importation, on payment of the duties and charges to which it might be subject by law at the time of such withdrawal. The section was amended in 1902 (32 Stat. 753) by the addition of the following proviso: "Provided, that the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal." The Circuit Court of Appeals gave controlling force to the proviso as fixing the meaning of the section. The court said that it had held in *Mosle* v. *Bidwell*, (130 Fed. Rep. 334,) "that the amendment of 1902 was declaratory of the meaning of the section prior to said amendment, and that its meaning as thus declared was that no greater or different duties should be imposed on goods when withdrawn from warehouse than would be imposed on other like goods imported at the time of withdrawal would be subject." Regarding this decision as conclusive the court said: "If other like goods had been imported at the time when these goods (the tobacco in question) were withdrawn, duty would have been assessed thereon according to their weight at such time." But the question in *Mosle* v. *Bidwell* was not the same as in the case at bar. The question now is not what rate of duty merchandise is subject to, or whether it is exempt from duty, but at what date its weight is to be taken as a basis of duty. And weight is a fact independent of the rate of duty. The proviso of section 20 of the Customs Administrative Act, therefore, can not be made paramount to the proviso in section 33 of the Tariff Act of 1897. Nor was that the purpose of its enactment. It was enacted to nullify the effect of the decision of the Cir-

cuit Court in *Mosle* v. *Bidwell*, by which section 20 was construed to require the payment of duties which had accrued at the time of importation, notwithstanding a change of rate or that the goods had become exempt from duty before their withdrawal from warehouse. This construction was contrary to the general understanding of the section and the practice of the Department. This, then, is our view: the Attorney General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 and intended to make no other change than to require as the basis of duty the weight of the merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse.

Judgment of the Circuit Court of Appeals is therefore reversed and that of the Circuit Court is affirmed and the case remanded to the latter court.

Mr. Justice MOODY took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.